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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RANDALL BRENT THOMPSON,
Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court Of Appeals For The Sixth Circuit

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ISSUES PRESENTED FOR REVIEW[1]

I. Can the National Railroad Passenger Corporation (Amtrak) By Contract Totally Exonerate Itself And Its Member Railroads From Liability For Injuries Suffered By Passengers Traveling On Passes Issue Pursuant To The Requirements Of A Collective Bargaining Agreement Between The Railroad And The Passenger's Union, And For Which The Member Railroad Is Required To Reimburse Amtrak Under 45 U.S.C. §565(f).

II. Has The Distinction Between "Paid" And "Gratuitous" Passengers, Which Allows An Interstate Common Carrier To By Contract Totally Exonerate Itself From Liability For Injuries To "Gratuitous" Passengers, Survived Either The Societal And Judicial Rejection Of Such Contracts Or This Court's Rejection Of The Notion Of "Federal Common Law" In *Erie Railroad* v. *Tompkins.*

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[1] Other plaintiffs included Melville Barnes, Darle A. Dale, Margaret Backs and Melvin Backs. The Sixth Circuit affirmed awards of substantial damages to all plaintiffs except the present petitioner.

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PETITION FOR WRIT OF CERTIORARI To The United States Court Of Appeals For The Sixth Circuit

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Petitioner, RANDALL BRENT THOMPSON, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 21, 1980, and its judgment overruling a petition for rehearing and rehearing en banc entered on July 15, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered May 21, 1980, is reported at 621 F.2d 814. The decision of the United States District Court for the Middle District of Tennessee is unreported. The opinions of the Court of Appeals and the District Court, insofar as the latter relates to petitioner, are included as Appendices to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on May 21, 1980. A petition for rehearing was duly filed by petitioner and was overruled on July 15, 1980. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTES INVOLVED

45 U.S.C. §565, in relevant part, provides:

> **§565. Protective arrangement for employees — Duty of railroads; discontinuance of intercity rail passenger service**
>
> (a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 545 and 562 of this title pursuant to any modification or termination thereof or an assumption of operations by the Corporation.
>
> (b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include

provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of Title 49. Any contract entered into pursuant to the provisions of this subchapter shall specify the terms and conditions of such protective arrangements. No contract under section 561(a)(1) of this title between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

(c) Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required by this section within one hundred and eighty days after assumption of operations by the Corporation.

. . .

(f) The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by a railroad on April

30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. The Corporation shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees under any policy or agreement referred to in the first sentence of this subsection, including the costs of implementing and administering this section. Within ninety days after the enactment of this sentence, each railroad shall enter into an agreement with the Corporation for the payment of such expenses. If the Corporation and a railroad are unable to agree as to the amount of any payment owed by the railroad under this subsection, the matter shall be referred to the Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, and its decision shall be binding on both parties. If any railroad company which operates intercity passenger service not under contract with the Corporation notifies the Corporation and railroads which have entered into the agreement specified above that it will accept the terms of the systemwide schedule of terms and the compensation specified in the agreements,

such railroad company shall be reimbursed for services to railroad employees in accordance with the agreements. As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

The Hepburn Act, 49 U.S.C. §1(7), provides:

§1, par. (7). Free transportation for passengers prohibited; exception; penalty. No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of

telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further,* That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter: *Provided further,* That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier

violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more than $2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41-43 of this title.

Congress, in 1978, totally revised Title 49 — the Interstate Commerce Act. Pub. Law 95-473, 92 Stat. 1343. The relevant provisions of the former Hepburn Act are now contained in 49 U.S.C.A. §10722, which, provides, in relevant part, as follows:

. . .

(c) A common carrier providing transportation subject to the jurisdiction of the Commission under one of those subchapters may provide transportation without charge for an individual who is —

(1) a necessary caretaker of livestock, poultry, milk, or fruit;

(2) an executive officer, general chairman, or counsel of an employee organization authorized to represent employees of that carrier under chapter 8 of title 45;

(3) an employee in charge of the mails when working or traveling to or from work;

(4) a newsboy on a train;

(5) a baggage agent; or

(6) a witness attending a legal investigation in which that carrier has an interest.

(d)(1) In this subsection —

(A) "employee of a carrier" includes an individual who —

(i) is furloughed, pensioned, or not on active duty because of advanced age or infirmity that occurred while the individual was employed by that carrier;

(ii) is being transported for purposes of reemployment by that carrier; or

(iii) was killed while employed by a carrier.

(B) "family" refers to the family of an individual named in clause (A) of this paragraph and includes the widow or minor child or an employee who died while employed by a carrier.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II, or III of chapter 105 of this title may provide transportation without charge for officers and employees (and their families) of that carrier, another carrier (by exchange of passes or tickets), or a telegraph, telephone, or cable company. A freight forwarder providing service subject to the jursidiction of the Commission under subchapter IV of that chapter may provide services related to movement of property for those individuals without charge. However, transportation of, or service provided for, household goods must be due to a change in the place of employment of an officer or employee while employed by that carrier.

T.C.A. §23-3004 provides that:

23-3004. Privity not required. — In all causes of action for personal injury or property damage brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said actions.

STATEMENT OF THE CASE

These suits arose out of the derailment of a National Railroad Passenger Corporation (Amtrak) train in Tennessee. At the time of the derailment, the train was under the operation of the employees of the Louisville & Nashville Railroad Company ("L & N"). The United States District Court for the Middle District of Tennessee, L. Clure Morton, Chief Judge, entered judgment on verdict for the injured passengers and the railroads appealed. In a split decision, the United States Court of Appeals for the Sixth Circuit, Cornelia G. Kennedy, Circuit Judge, affirmed the awards of damages for each of the plaintiffs, except that of the petitioner. Petitioner's judgment was reversed on the basis of a limitation of liability provision on the pass that he was issued pursuant to a collective bargaining agreement between the petitioner's union and the L & N. Circuit Judge Keith dissented from the majority opinion insofar as it reversed the judgment in favor of the petitioner, arguing that the pass issued to petitioner was supported by adequate consideration, which rendered void the provision exonerating the railroad from liability, and further stating that the rule upon which the majority relied was outmoded and should be rejected.

The History of Railroad Pass Provisions

The decision of the Sixth Circuit majority insofar as it reversed the judgment in favor of petitioner, rested in large part upon this Court's decision in *Charleston & Western Carolina R. Co.* v. *Thompson,* 234 U.S. 576, 34 S.Ct. 964, 58 L.Ed. 1476 (1914) and its forerunner, *Northern Pacific R. Co.* v. *Adams,* 192 U.S. 440, 24 S. Ct. 408, 48 L.Ed 513 (1904). The 1904 *Adams* "rule", which allowed interstate common carriers to by contract totally exonerate themselves from liabilities for injuries to "gratuitous" passengers, had its beginnings in the era of *Swift* v. *Tyson,* 41 U.S. 1, 10 L.Ed. 865 (1842), and actually stems from the 1853 decision of *Philadelphia and Reading R. Co.* v. *Derby,* 55 U.S. 468, 14 L.Ed. 502 (1853). There, this Court was unable to discern any difference between the duties

owed by a railroad to its paying and non-paying passengers holding that "public policy and safety" required that a railroad exercise "the greatest possible care and diligence" for the safety of **all** passengers, irrespective whether consideration was paid, and any less measure of care entitled an injured passenger to recover.

Then, in 1873, this Court held that it was against the public interest and public policy to permit common carriers to stipulate against the results of the negligence of themselves or their agents, and that while the rule applied both to carriage of goods and passengers, it applied with "special force to the latter." *New York Central R. Co.* v. *Lockwood,* 84 U.S. 357, 21 L.Ed. 627 (1873). The passenger in the *Lockwood* decision was a drover traveling on a railroad-termed "free" pass to look after cattle; the Court nevertheless struck down the pass provision that exonerated the railroad from liability, because the Court found the drover to be a "passenger for hire" although "the pass certifie[d] that the plaintiff was entitled to pass free." In reaching its decision, the Court reserved the question whether the rule would apply to a **strictly** free passenger. In the *Lockwood* decision, this Court refused to follow the decisions of the highest courts of New York, the state in which the carriage contract was made and the accident occurred, choosing instead to expressly ground its decision upon **federal** "general commercial law." 17 U.S. at 368, at 21 L. Ed. at 636. Four years later, however, the Court applied the *Lockwood* rationale again to a railroad-designated "free pass" passenger, finding that in fact there was consideration for the carriage and that it was not a "matter of charity" or a "mere gratuity." *Grand Trunk R. Co.* v. *Stevens,* 95 U.S. 655, 24 L. Ed. 535 (1878).

Out of this "general commercial law" background emerged the **federal** "general commercial law" doctrine that an **interstate** railroad could by stipulation exempt itself from liability for negligent injury to **strictly** free passengers. *See Northern Pacific R. Co.* v. *Adams, supra; Boering* v. *Cheasapeake Beach R. Co.,*

193 U.S. 442, 24 S. Ct. 515, 48 L.Ed. 742 (1904). The *Adams* Court treated its newly created "rule" as nothing more than an exception to the "general commercial law" enunciated in the earlier *Lockwood* decision, which denied the railroads the power to exempt themselves or their agents from the consequences of their negligence through the device of **railroad-termed** "free" passes.

The passes considered in the *Boering* and *Adams* decisions, however, were "strictly free." Furthermore, they were given at a time when, as demonstrated by the ensuing legislative history of the Hepburn Act, railroads were using passes to gain favors with public officials; consequently, users of "strictly free" as distinguished from **employees'** passes, were in disrepute. Thus, in both decisions, the sanctity of contracts was given greater weight than the public's interest in safe transportation and the railroad's stipulations against liability were upheld. By contrast, in both the *Lockwood* and *Stevens* decisions, no money was paid for passage; nevertheless, neither carriage was "strictly free" and the interests of the public in the safety of the railroads were expressly held to outweigh the sanctity of contracts and all other considerations.

In 1906, Congress passed the Hepburn Act, which, with certain exceptions, prohibited the issuance of "free" passes by railroads. 49 U.S.C. §1(7) (repealed); for current provision, see 49 U.S.C.A. §10722. One of those exceptions allowed the issuance of passes to railroad employees — not in the spirit of giving alms to beggars or favors to politicians, but to requite men for faithful work. In fact, the Congressional debate on the Hepburn Act discloses that it would have been difficult to pass a bill which failed to permit the issuance of passes to railroad employees:

> While I am on my feet I will take the opportunity to say in regard to the pass amendment or provision that I have received, as other Senators have, a great many telegrams

> from railroad employees and from *organizations of railroad employees* protesting against any provision being incorporated here that will prevent them from being supplied with or from accepting free transportation. I shall not take time to discuss that, as it has been fully discussed. I simply wish to say that I fully agree with them, and I believe that we ought not to enact any such legislation, and should we do so it would, in my judgment, be perpetrating a very great injustice upon the people. *The matter of free transportation, as the Senator from Wisconsin said yesterday, enters partly into the consideration for their employment, and we have no moral right to deprive them of that privilege.*

40 Cong. Rec. 7971.

After the passage of the Hepburn Act, in *Charleston and Western Carolina R. Co.* v. *Thompson,* 234 U.S. 576, 34 S. Ct. 964, 58 L.Ed. 1476 (1914), the wife of a railroad employee brought suit to recover for injuries she sustained while riding as a interstate railroad passenger on a pass. The Georgia Court of Appeals held that the Hepburn Act, by specifically authorizing the issuance of passes to railroad employees and their families, had sought to distinguish them from "purely gratuitous passengers." The Georgia court regarded passes issued to members of an employee's family as partial compensation for the employee's services, and for that reason distinguished persons riding on such passes from **strictly** free pass passengers, to whom the harsh *Adams* rule applied. 13 Ga. App. 528, 80 S.E. 1097. The Supreme Court, however, reversed the lower court's decision, stating that:

> The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families **it means what it says.**

234 U.S. at 577, 34 S. Ct. at —, 58 L.Ed. at 1479.

Significantly, the Court did not find that the pass on which the injured wife of the employee had ridden was free *in fact,* but held that the "pass was *free under the statute,"* thereby treating employees' passes as though they were **strictly** free, stating no other reason than the Hepburn Act's **designation** of such passes as "free." In making this threshold determination that the passes were "free", the Court ignored the earlier decisions in *Lockwood* and *Stevens* wherein the Court held that plaintiffs were "paid" passengers although in each case the person was traveling upon a pass that was **designated** by the railroad as "free" and for which no consideration was paid. *See also Norfolk Southern R. Co.* v. *Chatman,* 244 U.S. 276, 37 S. Ct. 499, 61 L.Ed. 1131 (1917) (Court again holding that designation of a pass as "free" does not necessarily render a pass free **in fact**). In upholding the pass's stipulations against liability for negligence, however, the *Thompson* Court relied **not on the Hepburn Act;** instead, it held that

> As the pass was 'free' under the statute, . . . the validity of its stipulations [against liability for negligence] . . . is established **by the decisions of the Court.** [Citing *Adams* and *Boering*].

234 U.S. at 578, 34 S. Ct. at —, 58 L.Ed. at 1479. Thus, the *Thompson* Court discovered the *Adams* "rule" **not in the Hepburn Act** but in the judicially created "general commercial law" that existed in 1904 when the Court rendered the *Adams* decision.

Similarly, in *Kansas City S. R. Co.* v. *Van Zant,* 260 U.S. 459, 43 S. Ct. 176, 67 L.Ed. 348 (1923), the Court repeated the statement made in *Thompson* that an employee's pass transportation is "free" again without any explanation of the underlying rationale. The Court nevertheless failed to in any way intimate that the Hepburn Act of its own forced placed employee-pass passengers in a separate class, to be negligently killed or injured with impunity. Instead, the Court again relied upon the rule

fashioned in the *Adams* and *Boering* decisions under the auspices of "general commercial law" to subject railroad employee passengers to this degradation.

Then, in 1948, this Court decided *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798 (1948). There, the Court, speaking through Justice Douglas, dispassionately applied the *Adams-Boering* rule to bar a wrongful death action brought against the employer railroad by the children of the employee passenger who was killed while riding on the railroad-termed "free" pass. The *Francis* majority held inapplicable the decision in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1923), wherein the Court rejected the "general commercial law" approach, uncritically holding that

> The rule of the *Adams, Thompson,* and *Van Zant* cases has become part of the warp and woof of the [Hepburn Act]

333 U.S. at 450, 68 S.Ct. at —, 92 L.Ed. at 804. Moreover, despite the aforementioned origin and evolution of the *Adams-Boering* rule, the Court held that the "rule" had progressed to the point where it was

> not a declaration of a 'general commercial law' but a ruling that 'the incidence and consequences' of the pass were controlled by the federal act 'to the exclusion of state laws and state policies.'

333 U.S. at 450, 68 S.Ct. at —, 92 L.Ed. at 804. Although the majority of the *Francis* Court was resigned to allow employees to remain at the level to which the *Adams-Boering* "rule" had subjected them, the *Francis* decision offered one glimmer of hope. In a strongly worded and well-reasoned dissent of Justice Black, in which he was jointed by two other members of the Court, it was pointed out that the outmoded *Adams-Boering* "rule" was inapplicable because

> In fact, some unions had bargaining agreements for passes, and Congressmen who spoke on the Hepburn Bill considered employees' passes to be a part of the inducement to work for railroads. Passes were spoken of by those who discussed legislation on the House and Senate floors **as part of the compensation of employees.**

333 U.S. at 450, 68 S.Ct. at —, 92 L.Ed. at 813 (Black, J., dissenting).

The glimmer of hope that Justice Black gave for the rights of the union employees riding as passengers on railroad-termed "free" passes, issued pursuant to union collective bargaining agreements, reached its zenith in *Martin* v. *The Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955), *cert. denied,* 350 U.S. 1013, 76 S.Ct. 657, 100 L.Ed. 873 (1956), in which the Sixth Circuit struck down a pass provision that exonerated the bus company from liability for personal injuries suffered by an employee-passenger while traveling on a "free" pass issued pursuant to the terms of a union collective bargaining agreement. In reaching its result, the Sixth Circuit rationalized that the pass was undeniably supported by recognizable consideration in the form of the collective bargaining agreement rather than constituting a mere *gratuity.* With the rendering of the Sixth Circuit's decision in the present case, the ray of hope that Justice Black flickered in *Francis* and that shined so brightly in *Martin* was extinguished.

The Petitioner's Union Agreement with L & N

Irrespective of the result reached by Justice Douglas in *Francis,* the present case does not present the question of the validity of stipulations against liability for negligence on what is a "strictly gratuitous" pass. Petitioner, at all times material hereto, was an electrician employed by L & N and a member of the International Brotherhood of Electrical Workers. Prior to the cessation of rail passenger service by L & N and its assumption by the National Railroad Passenger Corporation ("Am-

trak"), this union had a collective bargaining agreement with L & N, which agreement fixed wages, working conditions and benefits for its member employees. One of the **fringe benefits** furnished employees, including the present petitioner, pursuant to **the union contract** was the right of "free" passes for themselves and half-fare passes for their families on any passenger trains. Such passes had in fact been recognized as non gratuitous by Congress because, even in 1906, at the time of passage of the Hepburn Act:

> some unions had bargaining agreements for passes, and Congressmen who spoke on the Hepburn Bill considered employees' passes to be part of the inducement to work for railroads.

333 U.S. at 450, 68 S.Ct. at —, 92 L.Ed. at 813 (Black, J., dissenting).

Amtrak Legislation

On October 30, 1970, Congress passed the Railroad Passenger Service Act, 45 U.S.C. §501 *et seq.*, which authorized creation of the respondent, Amtrak. Pursuant to the authority given in the Act, Amtrak, on April 16, 1971, entered into a contract with L & N by which it acquired certain passenger service theretofore rendered by L & N. At the time this contract was entered into, there was no provision in the Railroad Passenger Service Act that dealt with "free" passage for employees.

Because the Railroad Passenger Service Act originially omitted any provision for issuance of employee passes, Amtrak declined to honor many railroad passes. This action was upheld in *Baker* v. *System Federation No. 1,* 331 F.Supp. 1363 (E.D. Pa. 1971). In *Baker,* as in the present case, Amtrak had entered into a contract with the member railroad to take over passenger service. That railroad, as did the L & N, had a collective bargaining agreement which provided for "free" transportation for railroad employees. When Amtrak declined to honor the

union agreement, the union threatened to strike and actions were brought to enjoin the union from declaring a strike as well as by the unions to enjoin the railroad and Amtrak from discontinuing to honor the employee passes. Amtrak's action in failing to honor the passes was upheld because **there was nothing in the contract between the member railroad and Amtrak requiring it to honor the passes and at that time the Amtrak statute was silent on the matter.** Ironically, the union that threatened to strike in *Baker* was the International Brotherhood of Electrical Workers, the very union of which the present petitioner is a member.

Subsequently, Congress, in response to the glaring inequity revealed by the *Baker* decision, amended the Act, specifically providing that:

> [Amtrak] shall take such action as may be necessary to assure, to the maximum extent practicable, any railroad employee **eligible** to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or **agreement** in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by [Amtrak] under this Chapter . . . . (Emphasis added)

45 U.S.C. §565(f) (prior to 1979 amendment). The amendment further provided that the employer railroad would **reimburse Amtrak for such costs** as Amtrak may sustain in providing transportation free to passholders. Thereafter, Amtrak mailed passes to the various railroads' employees, including the petitioner. The passes, however, did not allow the employee to board the train without a ticket, which could be acquired only by filling out the prescribed form with the Amtrak ticket agent. The 1979 amendments to the Act left unchanged the basic obligation on the part of the railroads to reimburse Amtrak for the costs of employee transportation.

Even before Congress amended the Act to further address the issue of employee passes, however, Amtrak and L & N, in their contract, had made provisions recognizing the **obligation** to issue employee passes. For example, Section 3.5 of the contract, at page 8, provides:

> . . . nor will it exercise its rights under Section 3.7, in a manner which would cause Railroad to violate the terms of or incur penalties, unless reimbursed by NRPC, in connection with any then **current labor agreement** between Railroad and any organization representing any of its employees. (Emphasis supplied)

Again, the contract in Appendix C-1, ¶ 2, pages 2 and 3, provides that:

> The rates of pay, rules, working conditions and all **collective bargaining** and other rights, privileges and benefits (including continuation of pension rights and benefits) of Railroad's employees under applicable laws and/or **existing collective bargaining agreements** or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

Once more under the contract, in Appendix C-1, ¶ 8, page 10, specific reference is made to the fringe benefits and provides as follows:

> No employee of Railroad who is affected by a transaction shall be deprived during his protective period of benefits attached to his previous employment, such as **free transportation,** hospitalization, pensions, relief, etc., under the same conditions and so long as such benefits continue to be accorded to other employees of Railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through authorization which may be obtained. (Emphasis supplied)

The District Court Decision

Plaintiffs, including petitioner, were injured in a derailment of an Amtrak train that was being operated by L & N employees pursuant to the terms of the aforementioned agreement between Amtrak and L & N. Injured plaintiffs filed suit in the United States District Court for the Middle District of Tennessee, jurisdiction existing under 28 U.S.C. §1332, by reason of the diversity of citizenship of the parties. In the ensuing consolidated action, Amtrak **stipulated both its negligence and the fact that it was liable for compensatory damages to the plaintiffs.** Amtrak, however, relying upon the *Adams-Boering* "rule", disclaimed liability to petitioner, an employee of the L & N, who, at the time of the accident, was traveling on a pass issued by Amtrak in satisfaction of its contractual and statutory obligations to honor the L & N collective bargaining agreement that provided for the issuance of such passes. That pass contained the following limitation of liability:

> RELEASE FROM LIABILITY: The user of this pass ticket expressly assumes all risks, personal injury or death, loss of or damage to property, and delay in connection with this transportation, and relieves Amtrak or its agents from all liability therefor. I AGREE TO THE FOREGOING CONDITION. /s/ Randall Thompson.

Amtrak contended from the outset that the release from liability accompanying petitioner's ticket absolved it from liability. Thus, the question presented to the district court was whether the waiver of liability was valid. The district court, relying upon the "general commercial law" surrounding such agreements, held that whether the pass rider received a pass merely as a gratuity or whether the pass was in fact supported by consideration was the test of the agreement's validity.

In an extensive and well-reasoned opinion, the district judge held that the waiver of liability provision was invalid because the pass was supported by consideration. In so holding, the

district court relied upon *Martin* v. *Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955), *cert. denied,* 350 U.S. 1013, 76 S.Ct. 657, 100 L.Ed. 873 (1956), in which the United States Court of Appeals for the Sixth Circuit held that the waiver of liability signed by the passholder did not preclude his action for damages against the bus company because the pass was furnished **in accordance with the passholders' union contract,** thus constituting a portion of his wages, as did other fringe benefits, such as Social Security, paid vacations, and hospitalization. The district judge further noted that L & N's statutory obligation, under 45 U.S.C. §565, to reimburse Amtrak for the cost of providing the passenger service to Thompson pursuant to the terms of the collective bargaining agreement, distinguishing those cases in which there was "no proof of consideration" for issuance of the pass. Therefore, the district court determined that petitioner was a "paid", as distinguished from a "free", passenger on the Amtrak train. Petitioner thus fell outside the *Adams-Boering* "rule" and the waiver of liability provision was of no effect. Amtrak and L & N were subsequently found liable to petitioner for compensatory damages in the amount of $275,242.47.

The Sixth Circuit Decision

The United States Court of Appeals for the Sixth Circuit in a 2-1 decision, affirmed awards of substantial damages in favor of every plaintiff in the consolidated case with the exception of petitioner. With respect to petitioner Thompson, the majority, relying upon the decision of this Court in *Charleston & Western Carolina R. Co.* v. *Thompson,* 234 U.S. 576, 34 S.Ct. 964, 58 L.Ed. 1476 (1914), reversed the district court's award of damages and upheld the validity of Amtrak's ticket provision that exonerated it from liability for personal injuries. In so holding, the Sixth Circuit ignored the obigation of Amtrak and L & N to furnish passes under the union agreement, choosing instead to rely upon the earlier language of this Court in *Thompson,* wherein this Court held that even if

> the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass, but, on the contrary, contemplated the pass as being what it called itself, free.

621 F.2d at 822 (quoting *Charleston & West Carolina R. Co.* v. *Thompson,* 234 U.S. at 578, 34 S.Ct. at 965, 58 L.Ed. at 1479). The Court furthermore rejected plaintiff's contention that the statutory obligation of L & N to reimburse Amtrak for the cost of providing such service when required under a collective bargaining agreement rendered Thompson's pass more than a mere "gratuity". *See* 45 U.S.C. §565(f).

Although recognizing the harsh consequences of its decision, the Court stated that it could only "point to the Supreme Court rationale in *Adams.*" Nevertheless, the majority was careful to point out that

> As the dissent in the present case notes, the *Thompson* decision is close to 70 years old. . . . *We feel bound by the decisions of the Supreme Court unless and until the Supreme Court changes its decision.* Were we free to do so, we might well reexamine whether the waiver of liability provision is against public policy and should not be enforced. Contracts limiting the liability of a party for his negligence are frequently held to be against public policy. What is against public policy depends on a case-by-case determination, but the rule is frequently stated that a party cannot protect himself by contract against liability for negligence in the performance of a legal duty or a duty of public service, or where a public duty is owed or public interest is involved, or where public interest requires the performance of a private duty. 175 A.L.R. 8, 14 (1948). Courts are generally hostile to contracts limiting liability and will strictly construe them. *See Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85, 89-91 (1955) (discussing hostility

> towards contracts limiting liability; holding that towers cannot so contract); *See generally* 57 Am. Jur. 2d *Negligence* §§20-31 (1971); *Restatement of Contracts* §§574, 575 (1932); 175 A.L.R. 8 (1948). Generally, contracts limiting liability for negligence will also not be upheld where the bargaining position of the parties is so unequal that one party is at the mercy of the negligence of the other. *See* W. Prosser, Handbook on the Law of Torts 442-45 (4th ed. 1971).

621 F.2d at 822, n.3.

Judge Keith dissented from the Sixth Circuit's decision insofar as it upheld the limitation of liability provision that denied recovery to petitioner. Initially, Judge Keith noted the Sixth Circuit's own decision of *Martin* v. *Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955), *cert. denied,* 350 U.S. 1013, 76 S.Ct. 657, 100 L.Ed. 873 (1956), in which it held that passes furnished under a collective bargaining agreement were in fact supported by consideration and were more than mere "gratuities". Judge Keith, as did the lower district judge, also held that the statutory obligation of Amtrak under 45 U.S.C. §565(f) to reimburse the L & N for passes issued pursuant to collective bargaining agreements showed conclusively that there was consideration supporting the employee's pass. Thus, Judge Keith viewed this Court's *Thompson* decision was not controlling. Judge Keith further questioned the wisdom of applying the seventy-year-old *Thompson* rationale to prevent recoveries in the present in light of modern social trends and in face of possible strikes by transportation employees before this Court recognized that "free" transportation when furnished pursuant to a collective bargaining agreement is given as a bargained-for exchange.

REASONS FOR GRANTING THE WRIT

I. Passes Issues To Employees Of Interstate Common Carriers Pursuant To Collective Bargaining Agreements Are Not "Gratuities" So As To Allow The Carriers To Limit Thier Liability For Personal Injuries To Passengers Traveling Under Such Passes.

Because of the Sixth Circuit's decision, the Court is now called upon to resolve a question expressly left open by the Court for sixty years. In *New York Central Railroad Co.* v. *Mohney,* 252 U.S. 152, 40 S.Ct. 287, 64 L.Ed. 502 (1920), this Court stated that it

> need not...consider the extent to which the case of *Charleston & W.C.R. Co.* v. *Thompson,* 234 U.S. 576, 58 L.Ed. 1476, 34 Sup.Ct.Rep. 964, is applicable to an employee using a pass furnished to him seemingly as a necessary incident to his employment.

252 U.S. at 158, 40 S.Ct. at —, 64 L.Ed. at 507. In *Mohney,* the employee/passenger, like the present petitioner, was furnished "as an incident to his employment," a so-called "free" pass on the employer/railroad, which pass contained a provision exonerating the railroad from all liability for personal injuries suffered by one using the pass. The state trial court found Mohney to be an **intra**state passenger; thus Ohio law, under which such provisions were void as against public policy, controlled, and a judgment was entered for Mohney.

The state court of appeals, however, concluded that Mohney was an **inter**state passenger and upheld the validity of the release upon the pass, relying, as did the Sixth Circuit in the present case, upon *Charleston & Western Carolina R. Co.* v. *Thompson,* 234 U.S. 576, 34 S.Ct. 964, 58 L.Ed. 1476 (1914). The state court of appeals nevertheless affirmed the judgment in favor of the plaintiff

> on the ground that the pass was issued to Mohney **as part consideration of his employment,** and ... for the reason that 'we clearly of the opinion that the negligence in this case, under the evidence was wilful and wanton.' For these reasons it was held that the release on the pass did not constitute a defense to the action.

252 U.S. at 154, 40 S.Ct. at —, 64 L.Ed. at 505. The question whether the principle of *Charleston & Western Carolina R. Co.* v. *Thompson* applied to passes issued as part consideration of one's employment, however, became unnecessary to the final outcome in *Mohney* because this Court ruled that Mohney was an **intra**state passenger; thus the **state** rather than the **federal** "general commercial law" rule applied. That question — whether the antiquated rational exemplified by *Charleston & Western Carolina R. Co.* v. *Thompson* should now be extended to bar the present petitioner from recovery and allow interstate common carriers to exonerate themselves from liability on passes issued to employees as incidents of their employment under collective bargaining agreements between the carriers and the employees' unions — now confronts this Court.

In upholding the limitation of liability that accompanied the present petitioner's pass, the Sixth Circuit majority has held that a benefit furnished under a collective bargaining agreement is not supported by valid consideration and is, in effect worth less. Without extended discussion of the ramifications of such a holding, the Sixth Circuit majority ignored the express language of three items that show clearly that the pass **was** supported by consideration. These are:

(1) The collective bargaining agreement between L&N and the petitioner's union providing for the passes;

(2) The contract between L&N and Amtrak whereby both recognized the obligations of the L&N (and consequently Amtrak) to provide passes under the collective bargaining agreement.

(3) The express provisions of 45 U.S.C. §565(f), which require that Amtrak be reimbursed by L&N for the costs of providing passes to employees and for which Amtrak was in fact reimbursed.

Judge Keith, who wrote in dissent, pointed out the defect in the majority's rationale and the serious ramifications that could result:

> Today's decision requires railroad employees to make an established benefit - riding on its employer carrier for less than published rates - the subject of a collective bargaining agreement and **possibily a strike before this court recognizes the benefit as being given in a bargained-for-exchange.**
>
> To believe that business organizations make a charitable "freebie" to its employees when employees or members of their families ride under the pass, is to ignore economic reality. Employees certainly weigh such factors before either taking initial employment or **evaluating potential for purposes of collective bargaining sessions.** Given the harsh fact that fuel costs have skyrocketed (and concommitantly increased travel costs), it borders on the absurd to suggest that the availability of travel passes at reduced rates does not induce employment with the railroad.

621 F.2d at 828 (emphasis supplied). Many of the same questions concerned Justice Black, dissenting in *Francis* v. *Southern Railway Co., supra,* wherein reference was made to the fact that as early as 1906, employee passes were the subject of collective bargaining agreements and were in fact distinguishable from the "strictly free' category. Furthermore, the failure of this Court to give a definitive answer to the question presented in *Mohney* has allowed the state and lower federal courts to reach varying results in attempting to resolve the issue. For example, the Sixth Circuit, in *Martin* v. *The Greyhound Corporation,* 227 F.2d 501 (6th Cir. 1955), *cert. denied* 350 U.S. 1013, 76 S.Ct. 657, 100

L.Ed. 873 (1956), refused to allow the bus company to defend a suit for personal injuries on the grounds that the pass contained provisions limiting the railroad's liability, holding that the issue passed was not gratuitous because it was issued pursuant to the provisions of the employee's **union contract** with the defendant bus company. In reaching this decision, the Sixth Circuit, speaking through Chief Judge Simons, stated that:

> We have behind the passes issued in our case no such background of court decision in practice as was reviewed in *Chapman,* neither do we have here any "improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee" as rationalized in *Thompson.* **Here is a specific written contract between the employer and employee, supported by recognizable consideration, which dispels all possible speculation denies the character of the pass as a gratuity. Moreover, the problem, as here presented, arises in an era of social, economic and legal change which has mitigated harsh technical defenses to suits for recovery for negligent injury, has given new values to employee benefits, and new sanctions to their denial.** Like all other so-called 'fringe benefits,' including hours and conditions of work, social security, paid vacations, hospitalization, etc., the issue of passes is also subject to **collective bargaining,** and, like other benefits, is a thing of value, subject, no doubt, to the revenue laws when received. There should be no diffculty in equating the value of the pass to the published tariff, in compliance with §317(b) of the Interstate Commerce Act. Such climate should and has conditioned interpretation when interpretation is reasonably indicated to effectuate the Congressional purpose.

227 F.2d at 504. One state decision concerning railroad pass provisions has specifically followed *Martin* v. *The Greyhound Corporation,* this being *Florida East Coast Railway Co.* v. *Booth,* 155 So.2d 551 (Fla. 1963). A similar result was reached

by the Third Circuit in *Sassaman* v. *Pennsylvania R. Co.*, 144 F.2d 950 (3rd Cir. 1944), wherein the court held that a railroad pass, to which a train dispatcher was entitled from the railroad because of his long service with the employer and **which was partly in lieu of additional pay** that would otherwise be required to cover dispatcher's transportation costs, was not a "gratuity"; hence, the dispatcher using such pass was a "passenger for hire" and a release of the employer's liability for negligence printed on the pass and transporting the dispatcher was void.

Besides the present case of *Thompson* v. *National Railroad Passenger Corporation,* 601 F.2d 814 (6th Cir. 1980), the Fourth Circuit, in *Gonzales* v. *Baltimore & Ohio R. Co.*, 318 F.2d 294 (4th Cir.), *cert. denied* 375 U.S. 911, 84 S.Ct. 208, 11 L.Ed.2d 151 (1963), refused to follow the rationale of the *Martin* decision. In *Gonzales,* plaintiff contended that the union of which her husband was a member had negotiated a contract with the railroad which required the railroad to provide passes over its lines and the lines of other railroads and that these were a part of the employees' compensation. The court initially pointed out that the plaintiff failed in her proof because she produced none of the contracts upon which she relied. The court, however, went further and sought to distinguish the *Martin* decision on the basis that:

> Nothing in the *Martin* case suggests that there would be no waiver of carrier liability by one using a pass containing a provision similar to the one in the case at bar if either Martin or his wife had been riding on a bus of a different company or if *railroads instead of buses has been involved.*

318 F.2d at 294. Such a distinction is tenuous at best because even the Sixth Circuit, in the present case, pointed out that:

> Although *Martin* involved a bus while *Uhlik* involved a train, the cases are not distinguishable on that basis since the National Motor Carrier Act, 49 U.S.C. §317(b), makes

> the provisions of the Hepburn Act applicable to common carriers by motor vehicles. Thus, decisions of the Supreme Court interpreting free passes on railroads under the Hepburn Act would seem to be equally applicable to buses.

621 F.2d at 821. The statement by the *Gonzales* court nevertheless demonstrates the length to which various lower courts have gone to follow the earlier decisions of this Court upholding railroad pass provisions, without any attempt to critically examine the result.

Two other lower federal courts have likewise upheld provisions exonerating carriers from liability that were contained on "free" passes. In *Uhlik* v. *Penn. Central R. Co.*, 459 F.2d, 460 (6th Cir. 1972), the Sixth Circuit dismissed the action against the railroad holding that

> there was **no proof** of consideration of the issuance of the pass, and no evidence was offered to support any claim that the Railroad Company was guilty of wilfull and wanton misconduct, which was not even pleaded.

459 F.2d at 461. Similarly, in *Braughton* v. *United Airlines, Inc.*, 189 F.Supp. 137 (W.D. Mo. 1960), the Court again upheld a provision on a "free" pass limiting the liability of the carrier, holding that

> true, plaintiff states that 'one of the reasons for (his) accepting employment' with TWA was that he had been advised that he 'would be entitled to passes on TWA flights for myself and the members of my family.' *Yet, there is no evidence in this record that tends to establish such a condition was ever made a part of plaintiff's contract of employment with TWA, such is considered by the Court in Martin* v. *Greyhound Corporation....*

189 F.Supp. at 142. The New York state courts have likewise apparently rejected the *Martin* rationale, *Warner* v. *New York Central R. Co.*, 43 Misc. 2d 848, 252 N.Y.S.2d 515 (1964), *rev'd*

per cirium 23 A.D.2d 642, 256 N.Y.S.2d 969 (1965), *later appeal,* 34 A.D.2d 275, 311 N.Y.S.2d 351 (1970).

The issue now presented to the Court is a substantial one. The transportation employees involved in all modes of transportation undoubtedly have negotiated union collective bargaining agreements under which they receive some consideration in the form of transportation arrangements with a carrier. The aforementioned cases show that these pass provisions certainly involve the entire transportation industry, including buses and railroads; the same question, however, also confronts employees of the airlines. *See, e.g., Braughton* v. *United Airlines, Inc.,* 189 F.Supp. 137 (W.D. Mo. 1960). The *Braughton* court again distinguished *Martin* on the basis that there was **no affirmative agreement** that "free" transportation was, expressly or impliedly, a part of plaintiff's contract of employment, and that plaintiff's "singular understanding regarding the issuance of passes by TWA [was] insufficient to establish an independent consideration for the passes issued by TWA...." 189 F.Supp. at 142. The concerns voiced by Judge Keith, dissenting in the present case, and Justice Black, dissenting in *Francis* v. *Southern Pacific Co.,* concerning reprisals by transportation workers, cannot be ignored. As shown by the actions of the present petitioner's own union in *Baker* v. *System Federation No. 1,* 331 F.Supp. 1364 (E.D. Pa. 1971), the labor organizations that represent the employees of the transportation industry will not stand quietly and watch the benefits that workers have received at the collective bargaining table be reduced to nothingness.

Moreover, the question whether a pass issued pursuant to a collective bargaining agreement is a "gratuity" has other ramifications outside the transportation industry. As shown by *O'Connell* v. *Mutual of Omaha Ins. Co.,* 6 Ill.App. 3d 698, 286 N.E.2d 773 (1972), a beneficiary sought recovery under a life and accident policy, which required that the plaintiff's deceased be a "fair-paying passenger" of the railroad at the time of his

death. The court, following *Martin* v. *The Greyhound Corporation,* held that there was consideration for the pass and thus the plaintiff's deceased was "fair-paying passenger", thus rendering the insurer liable.

The unanswered question of *Mohney* and the split among the various circuit and state courts on the issue whether passes issued pursuant to collective bargaining agreements are "gratuities" in itself warrants review by this Court. Moreover, the question is not insubstantial nor frivolous. Must the employees of the transportation industry refuse what is now a part of their compensation, i.e., passes for "free" transportation, in order to maintain their rights of legal redress? Must they also refuse other fringe benefits — can physicians affiliated with any industry stipulate that they will not be liable for malpractice when they render "free" medical treatment to employees under collective bargaining agreements. Under the rationale of the present case that is the undeniable result. Only a definitive Supreme Court precedent can resolve the conflict now existing among the courts and inform employees of the transportation industry whether they are in fact merely riding at the grace of their employers and at the mercy of their negligence or whether they have the same status of any other passenger having "paid" at the collective bargaining table as they would for any other fringe benefit.

The present Sixth Circuit majority has also ignored the actions of Congress, which, in 1972, amended the Rail Passenger Service Act, 45 U.S.C. §565(f), to read in relevant part as follows:

> (f) The Corporation shall take such action as may be necessary to assure, to the maximum extent practicable, any railroad employee **eligible** to receive free or reduced-rate transportation by a railroad on April 30, 1971 under the terms of any policy or **agreement** in effect on such date will be **eligible** to receive, provided space is available, free

or reduced-rate transportation on any inter-city rail passenger service provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement.

...

The Corporation shall be **reimbursed** by the railroads by the way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees under any policy or agreement referred to in the first sentence of this subsection, including the costs of implementing and administering this section. Within ninety days after the enactment of this sentence, each railroad shall enter into an agreement with the Corporation for the payment of such expenses. If the Corporation and the railroad are unable to agree as to the amount of any payment owed by the railroad under this subsection, the matter shall be referred to the Commission for Decisions. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, and its decision shall be binding on both parties. ... As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on a leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

By this enactment, Congress has specifically **required** that Amtrak **shall be paid** for any transportation it renders to employees of member railroads. Thus, irrespective whether L&N provided transportation under its collective bargaining agreement or as a mere "gratuity", Amtrak was required to honor L&N's policy but it had a reciprocal duty to reimburse Amtrak for its costs. Moreover, the statute speaks not in terms of giving alms to the

disadvantaged, but in terms of **eligibility** to receive transportation under **agreements.** Such language can only mean that Congress expressly recognized the rights of union employees that had been ignored by the courts under the pre-1972 version of 45 U.S.C. §565(f). *See Baker* v. *System Federation No. 1,* 331 F.Supp. 1363 (E.D. Pa. 1971).

The Sixth Circuit majority nevertheless held that Thompson's pass was a mere "gratuity" because "Amtrak derives no profit therefrom." The petitioner's employer, Amtrak and the Interstate Commerce Commission, however, had the amount of such reimbursement *totally under their control; yet, the Sixth Circuit majority upheld the contractual limitations of liability because Amtrak had not received all that it was entitled.* The amount of Amtrak's compensation was totally outside the control of petitioner and the harsh *Adams-Boering* "rule" should not be applied to those riding under a pass for which Congress has *mandated consideration.* Such a result is certainly outside the scope of this Court's former decisions regarding the distinction between "gratuitous" and "paid" passengers.

II. The "Federal Common Law" Approach To The Issue Of Employee Passes Is Not Viable Given The Present Social And Judicial Climate And The Rejection Of "Federal Common Law" By *Erie Railroad Co.* v. *Thompkins.*

As early as 1853, in *Philadelphia and Reading R. Co.* v. *Derby,* 55 U.S. 468, 14 L.Ed.502 (1853), this Court recognized that the public policy and "safety" required that a railroad exercise "the greatest possible care and diligence" for the safety of *all passengers* and was unable to discern any distinction between the duty owed to a paying versus a non-paying passenger. Yet, in the *Adams-Boering* line of cases, the Court engrafted upon the general rule an exception for "strictly" free passengers, holding that in such circumstances, railroads could stipulate against their liability for ordinary negligence. As shown by

Justice Black's dissent in *Francis* v. *Southern Pacific Co.*, at the time of the birth of the *Adams-Boering* "rule":

> Many believed, as shown by the legislative history of the Hepburn Act, that railroads were using passes to influence public men to favor railroads at the expense of the public good. Consequently, pass givers and pass users of "strictly free" passes as distinguished from givers and users of employees' passes, were in bad repute.

333 U.S. at 461-62, 92 S.Ct. at ——, 92 L.Ed.2d at 810.

When the Sixth Circuit rendered its decision in *Martin* v. *Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955), *cert. denied* 350 U.S. 1013, 76 S.Ct. 657, 100 L.Ed. 873 (1956), the court noted, aside from the requirements of the collective bargaining agreement, that:

> **Moreover, the problem, as here presented, arises in an era of social, economic, and legal change which has mitigated harsh technical defenses to suits for recovery for negligent injury, has given new values to employee benefits, and new sanctions to their denial.**

227 F.2d at 504.

Judge Keith, who dissented in the present case, pointed out that one of the reasons that prevented his concurrence in the majority's denial of petitioner's claim was purely a matter of public policy:

> We should sanction outmoded policies, technical defenses, or fictions which operate to defeat a just application of the law. Here, employee Thompson accepted a traveling pass which realistically constituted compensation for his status as an employee, and in the same action was required to waive injury resulting from his employer's negligence. Must Thompson refuse a part of his compensation, *i.e.*, the railroad pass, in order to maintain his right of legal

> redress? Clearly the employer railroad utilized its superiority to insulate itself from suit by its employees. This contractual waiver was not the result of a collective bargaining agreement. Judicial decisions in other areas of the law provide ample support that it is contrary to public policy to permit such overreaching in this modern day.

621 F.2d at 828. In support of his position, Judge Keith noted §§2-302 and 2-719 of the Uniform Commercial Code, relating to the doctrine of unconscionability. Petitioner would further point out that since the *Adams-Boering* "rule" was first enunciated, public policy has caused changes in many other areas of the law which would have been unheard of in 1906. For example, the courts have witnessed the downfall of the strict technical defense of privity. *E.g.*, TENN CODE ANN. §23-3004 (1979 Cum. Supp.), From *Greenman* v. *Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) and §402A of the Restatement (Second) of Torts evolved the doctrine of strict liability in tort. The present Sixth Circuit majority nevertheless denied relief to petitioner for the simple reason that "this Court can only point to the Supreme Court rationale in *Adams*", but taking care to point out that:

> As the dissent in the present case notes, the *Thompson* decision is close to 70 years old . . . *We feel bound by the decisions of the Supreme Court unless and until the Supreme Court changes its decision. Were we free to do so, we might well reexamine whether the waiver of liability provision is against public policy and should not be enforced.* Contracts limiting the liability of a party for his negligence are frequently held to be against public policy. What is against public policy depends on a case-by-case determination, but the rule is frequently stated that a party cannot protect himself by contract against liability for negligence in the performance of a legal duty or a duty of public service, or where a public duty is owed or public interest is involved, or where public interest requires the performance

> of a private duty. 175 A.L.R. 8, 14 (1948). Courts are generally hostile to contracts limiting liability and will strictly construe them. *See Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85, 89-91 (1955) (discussing hostility towards contracts limiting liability; holding that towers cannot so contract); *See generally* 57 Am. Jur. 2d *Negligence* §§20-31 (1971); *Restatement of Contracts* §§574, 575 (1932); 175 A.L.R. 8 (1948). Generally, contracts limiting liability for negligence will also not be upheld where the bargaining position of the parties is so unequal that one party is at the mercy of the negligence of the other. *See* W. Prosser, Handbook on the Law of Torts 442-45 (4th ed. 1971).

Such a result should not be allowed to stand when no sound argument has been or can be advanced for application of the 1904 *Adams-Boering* "rule" in today's progressive judicial and legislative environment. From the above quoted portion of the Sixth Circuit's opinion, it is evident that even the majority was asking to be relieved from the precedential effect of the now outmoded decisions of this Court and

> When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it.

Francis v. *Southern Pacific Co.*, 333 U.S. at 471, 68 S.Ct. at ——, 92 L.Ed. at 815 (Black, J., dissenting).

Moreover, as was pointed out by Justice Black in the *Francis* decision, there is substantial doubt that the *Adams-Boering* "rule" or the earlier doctrine from which it was engrafted survived this Court's decision in *Erie Railroad Co.* v. *Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). In that decision, this Court rejected the *Swift* v. *Tyson*, 41 U.S. 1, 10 L.Ed. 865 (1842) "transcendental" or "general commercial law" power of the federal court. The Sixth Circuit's present opinion, however, perpetuates and strengthens the old rule based upon

the repudiated *Swift* v. *Tyson* doctrine. The rule applied in the present case rests on no other foundation than a completely uncritical adoption of this Court's 1904 *Adams-Boering* "rule". As shown by an examination of the decisions from which the 1904 rule evolved, the *Adams-Boering* "rule" was not based upon nor did it involve an interpretation of any Congressional enactment, including the Hepburn Act; it is rooted now, as it was in 1904, in nothing but the original "transcendental general law" source of the era of *Swift* v. *Tyson*. Only this Court can change its decisions which have been characterized as a part of the "warp and woof" of the Hepburn Act. Nevertheless, these decisions constitute a defective part that this Court alone has woven into the Act and which clashes with the Congressional fashioned fabric and design. The Court must now restore that original design.

CONCLUSION

Petitioner realizes that in considering a petition for a writ of certiorari, this Court is not, as a general rule, concerned primarily with whether the decision below is correct or incorrect, but Petitioner understands that the Court is deeply concerned with the resolution of important questions of federal law. This latter concern should be paramount when, as in the present case, the state and lower federal courts have reached divergent results in applying an important although Court-fashioned rule of federal law. Because the present question expressly has been left undecided by the Court for more than half a century, and Congress, in the intervening years, has passed extensive legislation affecting the answer to the question, the Court must now take the opportunity to resolve the existing confusion within the lower courts. Moreover, when such Court-fashioned rules go unchanged through mere passage of time but nevertheless bind the lower courts to harsh and unforeseen results even when there exists doubt concerning the power of the federal courts to expound such rules, it is submitted that a case

is presented in which the Court must exercise its powers of supervision. For these reasons, Petitioner earnestly requests the Court to grant the petition for certiorari, to reverse the judgment of the Court of Appeals for the Sixth Circuit insofar as it relates to petitioner's railroad pass and to reinstate the judgment of the district court in his favor.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion Of The United States Court Of Appeals For The Sixth Circuit

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Randall Brent Thompson, *et al.*,
Plaintiffs-Appellees and Cross-Appellants,

v.

National Railroad Passenger Corporation and Louisville and Nashville Railroad Company,
Defendants-Appellants and Cross-Appellees.

Appeal from the United States District Court,
Middle District of Tennessee

Decided and Filed May 21, 1980.
Rehearing and Rehearing En Banc Denied
July 15, 1980

Before KEITH, KENNEDY and BOYCE F. MARTIN, JR., Circuit Judges.

CORNELIA G. KENNEDY, Circuit Judge.

The plaintiffs in these consolidated cases are passengers who sustained injuries in the derailment of a National Railroad Passenger Corp. (Amtrak) train in Tennessee on October 1, 1975. The train was being operated at the time by employees of the Louisville & Nashville Railroad Co. (hereinafter L & N) and the derailment occurred on track owned by L & N. Amtrak stipulated that it was liable for compensatory damages to all plaintiffs except Thompson, an employee of L & N, who was

traveling on a pass issued by Amtrak which contained a limitation of liability. The cases were tried by the court without a jury. The District Judge found L & N negligent and awarded all plaintiffs compensatory damages against both defendants. He rejected plaintiffs' claims for punitive damages.

Plaintiffs appeal, arguing the evidence does show intentional conduct which requires an award of punitive damages. They argue the failure to lower the speed limit after Federal Railroad Administration (FRA) regulations were promulgated and [621 F2d 817] after the FRA asked that the speed be lowered a year prior to the derailment is conduct showing a wanton disregard for the safety of the passengers. They also argue that the use of an SDP40F locomotive, a model which had been involved in several previous derailments, without testing the locomotive constituted gross, wilful, or wanton negligence.

Defendants also appeal, challenging the damage awards to five plaintiffs on several grounds. They claim all the awards are excessive, much higher than any awarded previously in Tennessee. They claim awards of separate amounts for pain and suffering, permanent injuries, and impairment to ability to enjoy life are duplicative. They assert that the award to plaintiff Barnes for impairment of earning capacity and to plaintiff Mr. Back for loss of consortium are not supported by the evidence. Finally, they argue that the limitation of liability provision in the free pass barred plaintiff Thompson from any recovery.

I. Punitive Damages

Plaintiffs claim defendants were grossly negligent in operating the train too fast around the curve where the derailment occurred. The court found that the train was going 61 miles per hour around the curve in question, that L & N had set a speed limit of 60 miles per hour for the curve sometime before the FRA regulations provided a formula for calculating speed around a curve based on the elevation of the outside rail and the degree of curvature. *See* 49 C.F.R. §213.57. L & N did not

recalculate its speed limits after the regulations were passed. The regulation is ambiguous because although it specifies that the minimum elevation should be used if the elevation is not uniform, it does not tell how to measure curvature or what curvature should be used if it is not uniform. The court found that under the regulations the speed limit on this curve was at least 55.47 miles per hour, possibly as high as 57 miles per hour. It was of the opinion that traveling at speeds of 5.53 miles per hour over the speed limit did not constitute gross negligence.

Plaintiffs argue that defendants, by failing to recalculate their speed limits on the curves and maintain them, although Amtrak was asked by the FRA in September, 1974 to check if its speeds were within permissible limits, constitutes wilful negligence. Defendants respond by arguing there was no evidence of prior accidents or incidents on that particular curve and that shortly before the accident, an FRA investigator and an L & N engineer traveled over the curve in a high-rail car looking for trouble spots and at that time the FRA investigator did not criticize their speed limit of 60 miles per hour. They deny that the FRA asked Amtrak to recompute speed limits on each of its thousands of curves.

Amtrak admitted it did not calculate the maximum permissible speed on the curve in question nor did it make any measurements on the curve, except such as were made by L & N.

Indeed, its retired Chief Mechanical Officer, Mr. Beischer, by deposition, stated that Amtrak did not have the personnel to make actual inspections of all the track over which Amtrak operated; Amtrak was dependent upon the railroads for this.

Mr. Vaughn, Division Engineer of Birmingham Division, L & N, by deposition, stated that prior to October 1975 he rode in a high-rail car with an FRA investigator who said he was investigating the curve in question on behalf of Amtrak. They rode over the curve, making a visual inspection. Mr. Vaughn

did not know how fast they were going. The FRA investigator made no comments with respect to the curve in question.

[1,2] The District Court found that defendants' speed limit was the result of a negligent miscalculation, not of gross or wanton misconduct. Rule 52(a), Fed. R. Civ. Pro., directs that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. This Court will not overturn findings of fact by the trial judge unless it [621 F.2d 818] is left with a definite and firm conviction that a mistake was made. *See J.A. Jones Construction Co.* v. *Englert Engineering Co.,* 438 F.2d 3, 5 (6th Cir. 1971). The evidence here fully justifies the District Judge's findings. *Southeastern Aviation, Inc.* v. *Hurd,* 209 Tenn. 639, 355 S.W.2d 436 (Tenn. 1962), *dismissed,* 371 U.S. 21, 83 S.Ct. 120, 9 L.Ed. 2d 96 (1962), cited by the District Court, is indistinguishable from the present case. There, a jury awarded compensatory and punitive damages to the plaintiff for wrongful death caused by a plane crash. The award of punitive damages was set aside. The common carrier was found to be negligent in operating with only one Automatic Direction Finder which it knew was faulty rather than with two that most planes had. However, the Tennessee Supreme Court held that there was no evidence of negligence so gross or wanton as to raise a presumption of conscious indifference to the consequences. Similarly, traveling too fast is negligence, but it does not show conscious indifference to the consequences.

[3] Plaintiffs also point to the use of a SDP40F locomotive as evidence of a conscious indifference to the consequences. Although the District Court did not discuss this in its opinion, we have carefully reviewed all of the evidence on this issue.

Carroll Ashby, Chief Operating Officer of the Division of the L & N in which the train was located, was not aware of any articles which had talked about the hazards of the SDP40F. Mr. Beischer, retired Chief Mechanical Officer of Amtrak, admitted

that prior to the accident there were a number of derailments drawn by the SDP40F. In several of the cases, the track was the cause of the derailment. He recalled that the Seaboard Coastline Operating Department claimed that the locomotive was at fault, and meetings were held and tests were run, but nothing was found to substantiate the claim.

The SDP40F was not a radical departure from previous designs. Amtrak was assured by General Motors (the manufacturer) that the locomotive had been subject to considerable design development from actual testing. Amtrak received 150 of these locomotives from June 1973 until late 1974 or early 1975.

During 1974, there were 34 Amtrak derailments. About six of those were pulled by the SDP40F, but at least two involved collisions with motor vehicles. About 75-80% of their trains, according to Mr. Beischer, were being pulled by the SDP40F, although only one-sixth of the derailments were drawn by the SDP40F. In 1975, there were 28 derailments, three were pulled by the SDP40F, one of which was the accident in question. Electromotive Division (of General Motors) also made tests on the locomotive March 8 and April, 1974. Mr. Beischer did not find anything in their report to indicate the locomotive was unsafe. Electromotive also conducted tests in Pennsylvania in July 1974. The SDP40F was found to exert less lateral force than exerted by the 85-foot freight train or the 3-axle freight locomotive, but greater lateral force than exerted by the 2-axle freight locomotive. In September 1974, an FRA representative suggested that before an instrumented test site was dismantled Amtrak test its SDP40F and compair it to the E 8 type locomotive. This was done, but it did not show any undue or unusual forces generated by the locomotive. Further testing on the ride was done on the Seaboard Coastline in October 1974, but nothing indicated that the SDP40F was unsafe. After the accident, and SDP40F (but not the one involved in the accident) was tested on an instrumented rail and compaired to two other kinds of engines. Again, Mr. Beischer did not find the results indicating any undue lateral forces from the SDP40F.

Mr. Wiggins, Vice-President of Operations for L & N, also testified by deposition that before the accident there were seven, eight, or nine accidents involving the SDP40F. He [621 F.2d 819] was in particular concerned with one accident on the Seaboard Line. (Seaboard is the parent company of L & N.) He was informed the accident was caused by some pressure against the ball of the outer rail which caused it to turn over. He then asked the engineering department or maintenance way department to check the structure of the track. However, he did not tell Amtrak or Mr. Adams that there might be a problem with lateral forces in the use of the SDP40F on curves. He apparently recalled receiving information about excessive lateral forces on the SDP40F, but could not recall receiving any such information prior to the date of the accident in question.

Mr. Mowatt-Larssen, of the FRA, testified that a conference was held with Amtrak and Electromotive Division in September 1974. This was precipitated by the derailment on the Seaboard Coastline in August 1974. One of his recommendations was to conduct fully instrumented tests on tangent and curved track to explore the possibility of undetected transient forces or other conditions that might contribute to the derailment of these locomotives prior to the purchase of more of these. However, he said he did not formally give this recommendation to Amtrak. He believes they discussed it. He did not recall any significant tests being conducted by Amtrak until 1976. He stated that the cause of all the derailments is not yet fully known.

Mr. Abbott, Mechanical Engineer, Office of the Director of Standards and Procedures, FRA, testified by deposition that he was present at the tests conducted in early 1976. The modified SDP40F had lateral forces comparable to other locomotives in use and the original version did not have substantially higher lateral forces on curves.

This Court cannot say that it is firmly and definitely convinced a mistake was made in not finding gross or wanton negligence in the continued use of the SDP40F. Repeated tests were

conducted on the SDP40F and none have shown conclusively that the lateral forces of the SDP40F were excessively high. Perhaps it was negligence not to fully test the locomotive after the conference with the FRA for lateral forces as well as for ride, but this court cannot say that defendants here acted with such a disregard of their consequences as to constitute gross negligence. The District Court's denial of punitive damages is affirmed.

II. Damage Awards

Plaintiff Thompson's award is challenged because he was travelling on a free pass providing for a release of liability due to negligence of Amtrak or its agents. Defendants object to the amounts awarded to other plaintiffs for compensatory damages as duplicative and excessive. Two specific awards - the loss of capacity to earn to plaintiff Barnes and the loss of consortium to plaintiff Mr. Backs - are challenged as unsupported by evidence.

A. Free Pass Issue

Plaintiff Thompson used his Amtrak pass to receive a free ticket for the trip involved in this case. At the time he received the ticket, he signed a request for the ticket which provided:

> RELEASE FROM LIABILITY: the user of this pass ticket expressly assumes all risk of personal injury or death, loss of or damage to property, and delay in connection with this transportation, and relieves Amtrak or its agents from all liability therefor. I AGREE TO THE FOREGOING CONDITIONS.

Defendants claim this provision prevents Thompson from recovering for injuries due to defendants' negligence. The District Court held that the pass was not free as L & N was obligated to pay Amtrak a statutory cost reimbursement for providing the passenger service to Thompson, and that, since

the release of liability provision is good only against gratuitous passengers, it did not bar Thompson's recovery.

The Supreme Court has held that free passes issued by interstate carriers and the conditions attached thereto are governed by federal law, not state law. *See Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 449-50, 68 S.Ct. 611, 613, 92 L.Ed. 798 (1948); *Kansas City Southern R. Co.* v. *Van Zant*, 260 U.S. 459, 468, 43 S.Ct. 176, 117, 67 L.Ed. 348 (1923); *Charleston & Western Carolina R.* [621 F.2d 820] *Co.* v. *Thompson*, 234 U.S. 576, 578, 34 S.Ct. 964, 965, 58 L.Ed. 1476 (1914).[1]

[4] Early Supreme Court decisions held that a provision in a gratuitously issued pass which released the railroad from liability due to its negligence was valid. *See Boering* v. *Chesapeake Beach R. Co.*, 193 U.S. 442, 24 S.Ct. 515, 48 L.Ed. 742 (1904); *Northern Pacific R. Co.* v. *Adams*, 192 U.S. 440, 453-54, 24 S.Ct. 408, 411, 48 L.Ed. 513 (1904). Later Supreme Court decisions held that Congress intended to preempt the issue of free passes in interstate commerce by passage of the Hepburn Act, 49 U.S.C. §1(7), which prohibited the issuance of free passes to all save certain enumerated classes of people including employees, and that the early decisions upholding limitation of liability provisions in free passes were part of the Hepburn Act. *See Francis, supra; Thompson, supra.* Thus, if an employee is traveling on a free pass, the Court will give effect to any release of liability provision contained therein. However, if there is consideration for the pass, the release of liability provision is not valid. *See Norfolk Southern R. Co.* v. *Chatman*, 244 U.S. 276, 37 S.Ct. 499, 61 L.Ed. 1131 (1917) (the Hepburn Act does not modify previous cases which held that a person traveling on

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[1] If the transport were wholly intrastate, then federal law would not apply. State law would be controlling. *See N.Y. Central R. Co.* v. *Mohney*, 252 U.S. 152, 40 S.Ct. 287, 64 L.Ed. 502 (1920); *Alderman* v. *Baltimore & Ohio R. Co.*, 113 F. Supp. 881 (S.D. W. Va. 1953); *Olsen* v. *Draper*, 112 F. Supp. 859 (E.D. N.Y. 1953).

a pass to care for livestock which the carrier was transporting for hire was a passenger for hire and any limitation on his pass was not valid).

Thompson presents two arguments that the pass was not free but supported by good consideration: 1) the pass was issued pursuant to a collective bargaining agreement and was part of his compensation for his work, and 2) L & N had to pay Amtrak for the passes issued by Amtrak to L & N employees.

1. **Employment as Valid Consideration for the Pass**

The Rail Passenger Service Act, 45 U.S.C. §501, *et seq.*, was amended in 1972 to provide that Amtrak shall provide to any railroad employee eligible to receive free or reduced-rate transportation under the terms of any policy or agreement existing at the time Amtrak took over intercity rail service free or reduced-rate service on Amtrak trains, with the condition that Amtrak be allowed to use a single system-wide schedule of terms. 45 U.S.C. §565(f). The legislative history indicates Congress was merely restoring rights the employees formerly had, not creating new rights. *See* Senate Rep. No. 92-756, 92nd Cong., 2d Session, 1972 U.S. Code Cong. & Admin. News 2393, 2396, 2400; Conference Report No. 92-834, 92nd Cong., 2d Session, 1972 U.S. Code Cong. & Admin. News, pp. 2436, 2441. This statute gave employees those rights they had previous to the creation of Amtrak - if the employees had no entitlement to a free pass before, the statute would not give them any such right. Thus, free passes, if issued at all, are not issued by virtue of this statute; they must be issued by virtue of a contract of employment or of a policy of the employer. The statute requires only that Amtrak recognize those pre-existing contracts or policies.

The collective bargaining agreement between L & N and its employees provides in Rule 44: "Employees and those dependent upon them for support will be given the same consideration in issuing free transportation as is granted other employees in

the service." This provision only guarantees equal treatment, not that employees shall receive passes. Plaintiff Thompson responds by arguing that L & N had a custom of giving these passes and that this custom was an inducement to work which constitutes the consideration.

In this Circuit, there is an apparent conflict regarding employment as consideration for free passes. In *Martin* v. *Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955), *cert. denied,* 350 U.S. 1013, 76 S.Ct. 657, 100 L.Ed. 873 (1956), this Court held that an [621 F.2d 821] employee of a bus company was injured while on a personal journey pursuant to a free pass was not barred from recovery by virtue of the limitation of liability provision contained in the free pass. As the employer was required to give these passes by the collective bargaining agreement, the pass was supported by consideration and was not gratuitous. *Martin,* unlike *Charleston & Western Carolina R. Co.* v. *Thompson, supra,* did not involve a mere possibility of getting an occasional free pass, but involved a definite commitment to grant free passes. However, the Court in *Martin* did not discuss *Francis,* the most recent Supreme Court case on the subject of free passes in interstate transport, and did not quote the collective bargaining agreement.

More recently, this Court in *Uhlik* v. *Penn Central R. Co.*, 459 F.2d 460 (6th Cir. 1972), held that plaintiffs who were riding the New York Central Railway pursuant to free passes issued by the railroad were barred from recovery by provisions in the passes releasing the railroad from liability and disclaiming any consideration for the passes. The husband had been laid off from his employment. Without mentioning *Martin,* the Court said there was no proof of consideration.

Although *Martin* involved a bus while *Uhlik* involved a train, the cases are not distinguishable on that basis since the National Motor Carrier Act, 49 U.S.C. §317(b), makes the provisions of the Hepburn Act applicable to common carriers by motor

vehicles. Thus, decisions of the Supreme Court interpreting free passes on railroads under the Hepburn Act would seem to be equally applicable to busses. *See Atlantic Greyhound Lines* v. *Skinner,* 172 Va. 428, 2 S.E.2d 441 (1939).

Martin can only be distinguished on the basis that in *Martin* the collective bargaining agreement required the issuance of free passes, whereas in *Uhlik* there was no showing that any employment contract required the issuance of free passes. Whether a requirement in a collective bargaining agreement that free passes be issued would be sufficient consideration given the rationale of the Supreme Court cases concerning free passes need not be decided here since there is no such express requirement in the present case.

In *Francis, supra,* in which the Court, per Justice Douglas, held that the free pass was a gratuity even though it had been issued to an employee, 333 U.S. at 449, 68 S.Ct. at 613, the dissent, per Justice Black, would not have given effect to the limitation of liability condition of the pass.[2] After reviewing legislative history, the dissent concluded that Congress recognized that passes issued to employees were part of the consideration for their employment. Some unions, the dissent suggested, had bargaining agreements on passes. 333 U.S. at 467 & n.7, 68 S.Ct. at 621. However, the Court was not presented with the consideration argument upon which the dissent in part relies - the petitioner did not argue that the employees' pass was supported by valid consideration. The petitioner conceded the limitation of liability provision in the pass would have been a defense to the employees' suit for negligence against the railroad had the employee lived. *See* Petitioner's Brief in Support of the Petition for Writ for Certiorari, at 47.

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[2] The dissent would also not have applied federal law but would have applied state law. State law here would not avail the plaintiff since Tennessee has recognized the validity of waiver of liability provisions. *See Empress Health & Beauty Spa, Inc.* v. *Turner,* 503 S.W.2d 188 (1973); *Louisville & Nashville R. Co.* v. *Hadley,* 11 Tenn. App. 642, 646 (1930).

The consideration argument was, however, presented to the Supreme Court in *Thompson, supra.* Plaintiff argued and the Georgia Court of Appeals agreed that the free pass used by the plaintiff was not a gratuity. The consideration for the pass was plaintiff's husband's employment. *See* Brief for Defendant in Error on Merits of Appeal, at 3-5; Defendant in Error's Motion to Dismiss and Brief in Support of the Motion, at 2-3, 4-5; *id.*, at 10-11 (opinion of the Georgia Court of Appeals). The Supreme Court, per Justice Holmes, rejected plaintiff's argument. After stating that the railroad was under no obligation to [621 F.2d 822] issue the free passes, the Court held that even if

> the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass, but on the contrary, contemplated the pass as being what it called itself, free.

234 U.S. at 578, 34 S.Ct. at 965.

Thus, if there is only the possibility of a free pass, *Thompson* forecloses the issue; the pass is a gratuity and any conditions attached limiting liability of the carrier for its negligence will be enforced. That this possibility of a free pass is mentioned in a collective bargaining agreement does not change the nature of the obligation - the carrier remains free not to give passes to anyone. While this Court recognizes that L & N may have a consistent custom of giving passes to all its employees and this custom may be an important motivating factor in the employees' decisions to work for the carrier, this Court is nevertheless bound by the decisions of the Supreme Court. In the present case, the record does not show L & N was required to give these passes to its employees, but only if it gave passes to any of its employees, it must give passes on the same basis to the railroad

employees. This mere possibility of a free pass is not sufficient consideration to make plaintiff Thompson a passenger for hire rather than a gratuitous passenger.[3]

2. Payment by L & N to Amtrak as Consideration for the Pass

The Railway Passenger Service Act provides that Amtrak shall be reimbursed by the railways for such costs as may be incurred in providing free or reduced-rate passes to the employees of the railways. If the parties cannot agree on the amount of payment, the matter would be referred to the Interstate Commerce Commission. *See* 45 U.S.C. §565(f). Defendants report that the Commission awarded Amtrak a reimbursement cost of $.0087 per mile which was approximately $2.00 for plaintiff Thompson's round trip between Nashville, Tennessee and Decatur, Alabama (about 220 miles).

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[3] As the dissent in the present case notes, the *Thompson* decision is close to 70 years old. However, the Supreme Court had the opportunity to change its rule when it reexamined the issue in 1949 in *Francis,* but it did not do so. We feel bound by the decisions of the Supreme Court unless and until the Supreme Court changes its decision. Were we free to do so, we might well reexamine whether the waiver of liability provision is against public policy and should not be enforced. Contracts limiting the liability of a party for his negligence are frequently held to be against public policy. What is against public policy depends on a case-by-case determination, but the rule is frequently stated that a party cannot protect himself by contract against liability for negligence in the performance of a legal duty or a duty of public service, or where a public duty is owed or public interest is involved, or where public interest requires the performance of a private duty. 175 A.L.R. 8, 14 (1948). Courts are generally hostile to contracts limiting liability and will strictly construe them. *See Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85, 89-91 (1955) (discussing hostility towards contracts limiting liability; holding that towers cannot so contract); *see generally* 57 Am. Jur. 2d *Negligence* §§20-31 (1971); *Restatement of Contracts* §§574, 575 (1932); 175 A.L.R. 8 (1948). Generally, contracts limiting liability for negligence will also not be upheld where the bargaining position of the parties is so unequal that one party is at the mercy of the negligence of the other. *See* W. Prosser, Handbook on the Law of Torts 442-45 (4th ed. 1971).

The legislative history indicates that Congress did not intend the reimbursement cost to be based on actual fares. It was anticipated that the reimbursement would be minimal since the passes would be issued on space available. *See* Senate Report, No. 92-756, 92nd Cong., 2d Session, 1972 U.S. Code Cong. & Admin. News pp. 2393, 2400.

The payment from L & N to Amtrak is similar to a service fee - it reimburses Amtrak for expenses in carrying an additional passenger on a train with empty seats, such as issuing the ticket, but Amtrak derives no profit therefrom. Other courts have held that the payment of small fees does not constitute consideration that would make the free pass other than a gratuity. *See Sims* v. *Northwest Airlines, Inc.*, 269 F.Supp. 272, 273 (S.D. Fla. 1967) ($45 service [621 F.2d 823] charge for plane tickets for plaintiff and family); *Richards* v. *Atchison, Topeka & Santa Fe R. Co.*, 226 F. Supp. 812, 814 (S.D. Iowa 1964) ($4.40 for seat reservations on train); *Luerssen* v. *Seaboard Air Line R.*, 203 F. Supp. 707, 708 (E.D.N.Y. 1962) (payment for Pullman accommodation); *Braughton* v. *United Air Lines, Inc.*, 189 F. Supp. 137, 140-42 (W.D. Mo. 1960) (payment of $6.00 service charge for train tickets); *Holeman* v. *Louisville & Nashville R. Co.*, 319 S.W.2d 47, 48 (Ky. 1958), *cert. denied*, 359 U.S. 1012, 79 S.Ct. 1148, 3 L.Ed. 2d 1036 (1959) (purchase of Pullman accommodations). This Court agrees that the payment of such small fees cannot be said to put the passenger traveling on a free pass in the same position *vis-a-vis* Amtrak as a passenger who paid for his ticket.

[5] Since under established law neither plaintiff Thompson's employment nor the payment of the small fee to Amtrak by L & N constitutes consideration for the free pass, Thompson was traveling gratuitously and the limitation of liability provision of that pass is valid, and Thompson is barred from all recovery.

While it seems harsh that Thompson is barred from recovery while the other plaintiffs are not, this Court can only point to the Supreme Court rationale in *Adams, supra:*

> The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered; and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

Northern Pacific R. Co. v. *Adams,* 193 U.S. 440, 453, 24 S.Ct. 408, 411, 48 L.Ed 513 (1904), quoted with approval in *Francis* v. *Southern Pacific Co.,* 333 U.S. 445, 448 n.2, 68 S.Ct. 611, 612, 92 L.Ed 798 (1948).

B. Duplicative Awards

The District Court awarded five elements of damages to plaintiffs Barnes, Mrs. Backs, and Darle: 1) expenses, 2) pain, suffering and fright, 3) permanent injuries, 4) impairment of earning capacity, and 5) impairment of enjoyment of life.[4] Defendants claim that impairment of enjoyment of life duplicates pain and suffering plus permanent injuries. They also claim there is no authority for awarding separate amounts for each intangible element of damages.

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[4] Four other plaintiffs also received awards, — Nixon, Thompson's wife and his two children, — but defendants do not appeal those awards.

[6,7] Damage awards by a trial court without a jury are findings of fact, which must stand unless they are clearly erroneous. *See* Rule 52(a), Fed. R. Civ. Pro.; *Traylor* v. *United States,* 396 F.2d 837, 839 (6th Cir. 1968); *Neal* v. *Saga Shipping Co., S.A.,* 407 F.2d 481, 487 (5th Cir.), *cert. denied,* 395 U.S. 986, 89 S.Ct. 2143, 23 L.Ed 2d 775 (1969); *Safer* v. *Perper,* 569 F.2d 87, 100, 186 D.C. App. 256 (D.C. Cir. 1977). That is, the awards must stand unless this Court is left, after viewing the entire record, with a definite and firm conviction that a mistake has been made. *Petition of U.S. Steel Corp.,* 436 F.2d 1256, 1261 (6th Cir. 1970), *cert. denied,* 402 U.S., 987, 91 S.Ct. 1649, 29 L.Ed 2d 153 (1971). The District Court must make subsidiary findings which indicate the measure of damages used and the considerations which led to the award. [621 F.2d 824] This Court has held that the elements of the damage award must be specified and the amount allocated to each disclosed to enable the appellate court to review the awards. *See Traylor, supra,* 396 F.2d at 839-40.[5]

[8] Tennessee recognizes impairment of enjoyment of life as an element of intangible damages. *See Martin* v. *Southern R. Co.,* 225 Tenn. 77, 80-81, 463 S.W.2d 690, 691 (1970) (court assumed the difference between the award and the proven damages was awarded for "the intangible elements of damage such as pain, suffering, inconvenience, and deprivation of the normal enjoyments of life"); *Dixie Feed & Seed Co., Inc.* v.

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[5] *See also Hatahley* v. *United States,* 351 U.S. 173, 182, 76 S.Ct. 745, 752, 100 L.Ed. 1065 (1956) (to satisfy Rule 52(a), court must allocate awards to each plaintiff rather than one lump sum); *Scheel* v. *Conboy,* 551 F.2d 41, 43-44 (4th Cir. 1977); *Hysell* v. *Iowa Public Service Co.,* 534 F.2d 775, 787 (8th Cir. 1976); *Fuchstadt* v. *United States,* 434 F.2d 367, 370 (2d Cir. 1970); *Lettsome* v. *United States,* 411 F.2d 917, 923 (5th Cir. 1969). *But see Pritchett* v. *United States,* 425 F.2d 663, 664 (5th Cir. 1970); *Neal* v. *Saga Shipping Co., S.A.,* 407 F.2d 481 (5th Cir.), *cert. denied,* 395 U.S. 986, 89 S.Ct. 2143, 23 L.Ed. 2d 775 (1969).

Byrd, 52 Tenn. App. 619, 637, 376 S.W.2d 745, 753 (1963), *cert. denied,* Tenn. S. Ct., *cert. denied,* 379 U.S. 15, 85 S.Ct. 147, 13 L.Ed 2d 84 (1964) (intangible elements of damages included "pain and suffering, inconvenience and the deprivation of the enjoyment of the normal activities of life"). However, both of these cases involved jury verdicts which were lump sums rather than itemized amounts for each kind of damages.

Other Tennessee cases list the considerations for determination of damages as the nature and extent of the injury, pain and suffering, expenses, loss of earning capacity, percentage of permanent disability, inflation, and the amount awarded in similar cases. *See Tullos* v. *Corley,* 337 F.2d 884, 887 (6th Cir. 1964); *Yellow Cab Co. of Nashville, Inc.* v. *Pewitt,* 44 Tenn. App. 572, 316 S.W.2d 17, *cert. denied,* Tenn. S. Ct. (1958); *France* v. *Newman,* 35 Tenn. App. 486, 248 S.W.2d 392 (1951), *cert denied,* Tenn. S. Ct. (1952).

[9] This Court has not found any Tennessee case which awarded both damages for permanent injury and impairment of enjoyment of life. However, this Court has recognized a difference between pain and suffering and impairment of enjoyment of life, *see U.S. Steel, supra,* 436 F.2d at 1265-67, and between pain and suffering and permanent injuries, *see Traylor, supra,* 396 F.2d at 839-40. Defendants rely upon *Winter* v. *Pennsylvania R. Co.,* 45 Del. 108, 68 A.2d 513 (Del. 1949), in which the Delaware Court held that deprivation of mental and spiritual comfort and enjoyment was not a separate element of damages under Delaware law. Instead, the jury was to consider all activities which may be impaired — business, pleasure, or otherwise — when calculating the amount for permanent injuries. However, conceptually, these categories of intangible damages are distinct. Compensatory damages are meant to make the person whole in the only way the court knows how, which is to give an equivalent in money for each loss suffered. Pain and sufering, permanent injury, and loss of enjoyment of life each represent separate losses which the victim incurs. Per-

manent impairment compensates the victim for the fact of being permanently injured whether or not it causes any pain or inconvenience; pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; and loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury. It may be argued that a court should not award a person damages for a permanent injury which does not cause any pain and suffering or does not limit the victim's life in any way. But before the tortious conduct, the victim did not have the permanent injury. After the conduct, the victim has been permanently injured. The court cannot make the victim whole by taking away the permanent injury — it can only award a monetary sum roughly equivalent to the severity of the permanent injury. The District Judge obviously thought these were distinct categories for he did not award the same amount for permanent injuries as he did for impairment to enjoy [621 F.2d 825] ment of life. If the District Court had included impairment of enjoyment of life as an element of permanent injury, the awards in the permanent injury category would probably have been higher.

[10] Since the Tennessee courts have recognized on different occasions impairment of enjoyment of life and permanent injuries, and since this Court has instructed lower courts to itemize damages, this Court cannot say the District Court erred in either itemizing the award or the categories it chose to use.[6]

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[6] The District Court awarded sums for "pain, suffering, and fright" as one category of damages. Tennessee law does not allow recovery for fright alone. *See Hoskins* v. *Blalock*, 384 F.2d 169, 171 (6th Cir. 1967); *Memphis St. R. Co.* v. *Bernstein*, 137 Tenn. 637, 194 S.W. 902 (1917); *Colsher* v. *Tennessee Electric Power Co.*, 19 Tenn. App. 166, 84 S.W.2d 117, *cert. denied*, Tenn. S. Ct. (1935). *See also Bowers* v. *Colonial States Interstate Transit, Inc.*, 163 Tenn. 502, 43 S.W.2d 497 (1931) (no recovery for mental anguish alone). But Tennessee does allow recovery for physical pain and suffering which results from fright. *See Bernstein, supra; Trent* v. *Barrows*, 55 Tenn. App. 182, 397 S.W.2d 409, *cert. denied*, Tenn. S. Ct. (1965).

C. Plaintiff Barnes' Loss of Earning Capacity

Defendants urge that the award of $60,000 to plaintiff Barnes for impairment of earning capacity was unsupported by the evidence as there was no proof of any lost earnings and no loss of capacity to earn since Barnes is still working at his previous job.

[11] Tennessee compensates a personal injury victim not for the actual lost earnings but for the loss of the capacity to earn. A plaintiff may recover for lost capacity to earn even though there has been no actual loss of earnings, *see Dixie Feed, supra,* 376 S.W.2d at 750; *Southern Coach Lines, Inc.,* v. *Wilson,* 31 Tenn. App. 240, 214 S.W.2d 55, *cert. denied,* Tenn. S. Ct. (1948), or the plaintiff made more money after the accident than before, *see Tullos* v. *Corley,* 337 F.2d 884, 886 (6th Cir. 1964). Thus, that Barnes did not prove loss of earnings is not fatal to his recovery.

[12] The District Judge found that Barnes was a 65-year-old partner in a stock brokerage firm with an income in excess of $150,000 per year who was unable to resume full-time duties until approximately January 1, 1976. Barnes testified that he supervised all the branch offices of the firm which are spread throughout the United States and that he was required to travel to these offices as part of his duties. The District Judge found that Barnes was unable to travel, had an assistant to relieve him of some of his duties, and lost about two months of work. Since Barnes could have worked as long as he was physically and mentally able, the District Court found that his capacity to earn was greatly impaired.

Although the District Court noted in a footnote that the passengers were badly frightened by the experience, none of his discussion of the plaintiffs' injuries which justified the awards specifically mentioned the plaintiffs' fright. It appears that the District Court did not rely upon fright alone to make his awards.

Wilson v. *Cook Manufacturing Co.*, 56 Tenn. App. 129, 405 S.W.2d 584, *cert. denied*, Tenn. S. Ct. (1966), cited by defendants, is distinguishable. There, plaintiff was not allowed to recover for loss of earnings capacity but plaintiff's doctor testified plaintiff had a normal and complete recovery. Plaintiff himself admitted the only pain he had felt had gone away and he had resumed his former job. Here, Barnes is permanently disabled and has had to curtail his former duties. Plaintiff is entitled to his past loss of earning capacity as well as his future. *See Southern Coach Lines* v. *Wilson, supra,* 214 S.W.2d at 57.

This Court cannot say that the District Court erred in awarding $60,000 to Barnes for loss of earning capacity. Two months' salary for someone earning $150,000 per year would be $25,000. (For someone earning $200,000 per year, as Barnes testified his earnings were, two months' salary would be about $33,000.) When one adds the inability to now perform all his duties and that he can work as long as he is able to perform his duties, $60,000 is not unreasonably high. [621 F.2d 826]

D. Plaintiff Mr. Backs' Loss of Consortium

[13] Defendants claim the award of $25,000 to Mr. Backs for the loss of consortium of his wife was erroneous because there was no evidence of the monetary value of the lost services Mrs. Backs performed around the house and because there was no evidence pertaining to any lost conjugal relations.

In *Martin* v. *Southern R. Co., supra,* the court refused to consider as an element of damages the amount for the full-time help the plaintiff would need as the probable cost of this element of damages was not presented in the evidence. But that case did not involve a loss of consortium which is not as easy to value as the cost of hired help. In *Lamb* v. *Jones Wholesale Co., Inc.*, 454 F.Supp. 129 (E.D. Tenn. 1978), the Court remitted the award where the wife had not proved a loss of consortium but only a loss of her husband's services mowing the grass, gardening, and driving the car. There was no proof of monetary

value of these services, but the court did not require proof. It merely held it did not think these services were worth $15,000 and suggested a remittitur of $12,000. The Tennessee Supreme Court has held that a father need not prove the loss of services resulting from his son's injury by an exact calculation in order to recover for such a loss. *Central Manufacturing Co.* v. *Cotton,* 108 Tenn. 63, 67, 65 S.W. 403 (1901). The Tennessee Appellate Court has held a husband need not prove loss of his wife's consortium with exactness. *See All* v. *John Gerber Co.,* 36 Tenn. App. 134, 143, 252 S.W.2d 138, *cert. denied,* Tenn.S.Ct. (1952). Thus, Mr. Backs should not be barred from recovering even though he did not prove the monetary value of his wife's services which he has lost.[7]

Mrs. Backs testified that she cannot do her household chores, cannot cook, cannot drive, and needs help getting out of the tub.

Mr. Backs testified that they now eat out most of the time since his wife cannot cook. He now must do all the housework, whereas before he did none of it. He further testified that her physical and emotional condition has changed dramatically since the accident.

Consortium has been defined as "not only loss of support of services, [but also] such elements as love, companionship, affection, society, sexual relations, solace and more." *See Rodriquez* v. *Bethelem Steel Corp.,* 12 Cal.3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974) (quoting *Millington* v. *Southeastern Elevator Co.,* 22 N.Y.2d 498, 293 N.Y.S.2d 305, 308, 239 N.E.2d 897 (1968)); *All, supra,* 36 Tenn.App. at 141, 252 S.W.2d 138.

The District Court found that Mr. Backs has been required to alter his usual business habits and practices to care and assist his

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[7] For an interesting method of making a valuation of lost services, see Kiker, *Evaluating Household Services,* Trial, Feb. 1980, at 34.

wife. He is deprived of her affection, society, companionship and consortium and will have to expend sums of money in the future to pay for the services she would have performed had she not been injured.

While $25,000 may seem high for the loss of household services and companionship that was established in the record, this Court may not substitute its judgment for that of the trial court. If this Court were to order a remittitur, it could only order a remittitur to such an amount as would not seem palpably excessive, giving to the trial court the latitude in fixing the amount to which it is entitled. *See Dixie Feed, supra,* 376 S.W.2d at 754; *Olson* v. *Sharpe,* 36 Tenn. App. 557, 259 S.W.2d 867, 875, *cert. denied,* Tenn. S.Ct. (1953). Since the award as it stands does not appear palpably excessive, this Court affirms the award to plaintiff Mr. Backs.

E. Excessiveness of the Awards

Defendants object to the awards to plaintiffs Barnes, Mr. Backs, Mrs. Backs, and Darle as being excessive, much higher than awards previously granted in Tennessee. Plaintiffs claim the cases defendants point to are not truly comparable and that the [621 F.2d 827] court must consider the effects of the high inflation this country has recently experienced.

[14,15] The amount of a damage award in a personal injury action is for the jury or, in a non-jury case, the trial judge who heard the evidence. Absent a showing of bias, passion, or corruption, the excessiveness of a verdict is left to the trial court's discretion. The appellate court will only consider whether the trial court abused its discretion by granting an award so large as to shock the judicial conscience. *See Stengel* v. *Belcher,* 522 F.2d 438, 444 (6th Cir. 1975), *cert. dismissed,* 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976); *Kroger Co.* v. *Rawlings,* 251 F.2d 943, 945 (6th Cir. 1958); *Olson* v. *Sharpe,* 36 Tenn. App. 557, 259 S.W.2d 867, *cert. denied,* Tenn. S. Ct. (1953); *Yellow*

Cab Co. v. *Pewitt,* 44 Tenn. App. 572, 316 S.W.2d 17, 22, *cert. denied,* Tenn. S. Ct. (1958); *Clinchfield R. Co.* v. *Forbes,* 57 Tenn. App. 174, 417 S.W.2d 210, 217 (1966), *cert. denied,* Tenn. S. Ct. (1967).

[16] When considering whether an award is excessive, the Court will consider other awards in other cases, *see Martin* v. *Southern R. Co., supra,* 225 Tenn. at 82, 463 S.W.2d 690; *France* v. *Newman,* 35 Tenn. App. 486, 248 S.W.2d 392 (1951), *cert. denied,* Tenn. S. Ct. (1952), as well as the nature and extent of the injuries, suffering, expenses, diminution of earning capacity, inflation and high cost of living, age and expectancy of life, *see Olson* v. *Sharpe, supra,* 259 S.W.2d at 875.[8] But the cases involving similar injuries are in no sense controlling. *See Petition of U.S. Steel Corp.,* 479 F.2d 489, 501 (6th Cir.), *cert. denied,* 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed. 2d 110 (1973).

[17] Defendants compare the back injuries of Barnes to several cases involving back injuries and the leg injuries of Darle and Mrs. Backs to cases involving leg injuries. However, a number of these cases are ten years old or more, did not involve plaintiffs with comparable occupations and earning capacities, or apparently did not involve permanent injuries like those of the plaintiffs in this case. The District Court stated what factors he considered in making the awards and supported his awards by findings with respect to the plaintiff's conditions and the future pain and limitations they are likely to suffer. Although the awards may be high, they do not shock this Court's conscience. Considering the present deflated value of the dollar and that personal injury damages are unliquidated without any fixed measure of mathematical certainty, *see Kroger* v. *Rawlings,* 251 F.2d 943, 945 (6th Cir. 1958), these awards are not excessive.

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[8] On the propriety of considering inflation, also see *Martin* v. *Southern R. Co., supra,* 225 Tenn. at 83, 463 S.W.2d 690; *France, supra.*

The District Court's judgments with respect to all plaintiffs save plaintiff Thompson are affirmed. The judgment in favor of plaintiff Thompson is reversed.

KEITH, Circuit Judge, concurring in part, dissenting in part. I am unable to agree that the contractual provisions in this case shielding the defendant carriers from adjudicated liability should be given legal effect for two reasons. First, I am persuaded that there existed consideration for the railroad pass, and therefore, this case is controlled by *Martin* v. *Greyhound Corporation,* 227 F.2d 501 (6th Cir. 1955), *cert. denied,* 350 U.S. 1013, 76 S.Ct. 657, 100 L.Ed. 873 (1956). Second, it is contrary to public policy to permit the contracting away of the liability for one's negligent conduct to one's employees where the employer enjoys the benefits of what is in effect a public monopoly. In effect defendants seek the benefits of monopoly status as well as the fruits of the free enterprise system.

Charleston & Western Carolina Railroad v. *Thompson,* 234 U.S. 576, 34 S.Ct. 964, 58 L.Ed. 2d 1476 (1914), serves as the cornerstone of the majority opinion. *Thompson* holds that the mere possibility of an occasional pass from the railroad company, even [621 F.2d 828] if constituting a partial motive for employment, would be insufficient consideration. Thompson's recovery was accordingly barred. I question the wisdom of applying this seventy year old notion of consideration to our modern world. Today's decision requires railroad employees to make an established benefit - riding on its employer carrier for less than published rates - the subject of a collective bargaining agreement and possibly a strike before this court recognizes the benefit as being given in a bargained-for-exchange.

To believe that business organizations actually make a charitable "freebie" to its employees when employees or members of their families ride under the pass, is to ignore economic reality. Employees certainly weigh such factors before

either taking initial employment or evaluating potential provisions for purposes of collective bargaining sessions. Given the harsh fact that fuel costs have skyrocketed (and concomitantly increased travel costs), it borders on the absurd to suggest that the availability to travel passes at reduced rates does not induce employment with the railroad.

In *Martin* v. *Greyhound Corporation, supra,* this circuit recognized that "[t]he passes were in a real sense part of the compensation paid . . ." While the specific contractual provision dispelled all possible speculation that the character of the past was a gratuity, *Martin* did recite *Norfolk Southern Railroad Co.* v. *Chatman,* 244 U.S. 276, 37 S.Ct. 499, 61 L.Ed. 1131 (1916), in which the Supreme Court acknowledged that "the mere designation of a pass as free does not constitute it as a gratuity." *Id.* As the plaintiff's employer, Louisville and Nashville Railroad was obligated to pay Amtrack some cost in providing passenger service to Thompson, consideration was in fact present.[1]

The second reason which prevents my concurrence in the majority's denial of employee Thompson's claim, is purely a matter of public policy. We should not sanction outmoded policies, technical defenses, or fictions which operate to defeat a just application of the law. Here, employee Thompson accepted a traveling pass which realistically constituted compensation for his status as an employee, and in the same action was required to waive injury resulting from his employer's negligence. Must Thompson refuse a part of his compensation, *i.e.,* the railroad pass, in order to maintain his right of legal redress? Clearly the employer railroad utilized its superiority to insulate itself from

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[1] Amtrak argues that the rejection by the Interstate Commerce Commission of Amtrak's request for full reimbursement of allocated cost eliminates consideration as an issue. But a review of the record reveals that $.0087 per mile was awarded; consideration therefore was present.

suit by its employees. This contractual waiver was not the result of a collective bargaining agreement. Judicial decisions in other areas of the law provide ample support that it is contrary to public policy to permit such overreaching in this modern day. In 1914, when *Charleston & Western Carolina Railroad* v. *Thompson, supra,* was decided, the validity of a waiver of liability was undisputed. With the emergence of modern notions of public policy this is no longer true today.[2] Because the majority opinion refuses to permit this ancient manner of overreaching to die by denying plaintiff employee Thompson his right of recovery, I dissent.

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[2] In addition to the authorities cited in n. 3 of the majority opinion, see the Uniform Commercial Code on unconscionability, U.C.C. §§2-302, 2-719.

APPENDIX B

Opinion of the United States District Court for the Middle District of Tennessee

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
(Filed December 29, 1978)

NO. 76-321-NA-CV

Randall Brent Thompson, et al.

vs.

National Railroad Passenger Corporation
and Louisville & Nashville Railroad Company

MEMORANDUM

Each of these consolidated cases involves personal injuries resulting from the derailment of an Amtrak passenger train known as "The Floridian" at or near Frankewing, Tennessee, on October 1, 1975.

The case of Elizabeth Marie Pennington v. National Railroad Passenger Corporation and Louisville & Nashville Railroad Company, No. 76-143-NA-CV, was settled prior to trial. The Pennington case will, therefore, not be considered in this opinion, except that the plaintiff therein is onerated with a portion of such expenses and compensation of liaison counsel as the court may award in a subsequent hearing.

These causes were heard by the court without the intervention of a jury on April 3 and 4, 1978.

For many years prior to October 30, 1970, the defendant Louisville & Nashville Railroad Company (L & N) was a common carrier by rail, transporting both freight and passengers in

interstate commerce throughout the southeastern part of the United States, including a route between Nashville, Tennessee, and Birmingham, Alabama.

On October 30, 1970, the Congress of the United States passed a very comprehensive Railroad Passenger Service Act, 45 U.S.C. §501 *et seq.*, which created the defendant National Railroad Corporation (Amtrak). One of the crucial sections of this Act as it affects the case at bar is 45 U.S.C. §561, which provides in part as follows:

> (a)(1) On or before May 1, 1971, the Corporation (Amtrak) is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service.
>
> . . . .
>
> (c) No railroad or any other person may, without the consent of the Corporation, conduct intercity rail passenger service over any route over which the Corporation is performing scheduled intercity rail passenger service pursuant to a contract under this section.

On April 16, 1971, Amtrak entered into a contract with L & N pursuant to this statutory provision whereby it acquired certain passenger service theretofore performed by the defendant L & N, including passenger service between Nashville, Tennessee, and Birmingham, Alabama. Under paragraph (c) 45 U.S.C. §561, L & N lost and gave up its right to transport passengers as a common carrier between Nashville and Birmingham as of the effective date of this contract, May 1, 1971. As stated in the case of *In re Penn Central Transportation Co.*, 329 F.Supp. 572, 575-6 (E.D. Pa. 1971):

> It is clear that the intercity rail service provided by Amtrak is to be in complete substitution for the intercity rail service theretofore supplied by the contracting carrier.
>
> . . . .
>
> Section 401(a)(1) of the Amtrak Statute provides that "upon its entering into a valid contract . . . the railroad shall be relieved of all of its responsibilities as a common carrier of passengers by rail in intercity rail passenger service."

Under the terms of the contract between Amtrak and L & N, as well as similar contracts with other railroads over which the train in question operated, Amtrak, on or about May 1, 1971, commenced the operation of the passenger train known as "The Floridian" between Chicago, Illinois, and Miami, Florida. This train operated over tracks belonging to the L & N Railroad between Nashville and Birmingham.

Under the terms of this contract, all of the equipment, including the passenger cars and engines within the "consist" of the train, was owned by the defendant Amtrak. All of the passengers riding the train purchased their tickets from Amtrak. The personnel serving the passengers aboard the train, including the conductor and the dining car employees, were employees of Amtrak. The defendant L & N furnished the engineer and the other operating personnel for the train to Amtrak. In exchange for the use of the L & N track, roadbed, right-of-way, and operating employees, Amtrak paid L & N a certain fixed amount of monthly compensation. In addition, L & N was paid certain periodic bonuses if the train operated over L & N's tracks within the scheduled timetable. This contract delineated the speeds at which the train could be operated along the L & N right-of-way. Amtrak was granted the right to call upon L & N to maintain properly its tracks, roadbeds, and speed limits.

At the time of the occurrence of the accident in question, the "Floridian" was being operated pursuant to the above contractual arrangement. All of the plaintiffs were at the time of the accident riding as fare-paying passengers and were the holders of the tickets issued by the defendant Amtrak.

. . .

The most troublesome issue in these consolidated cases is the question of whether the plaintiff Randall Brent Thompson is entitled to recover against the defendants or either of them for his injuries sustained in the derailment in question. Mr. Thompson is and has been employed for several years as an electrician by the defendant, L & N. The bargaining agent for L & N's electrical workers is the International Brotherhood of Electrical Workers. The basic contract under which they work, dated September 1, 1973, provides that, "Employees and those dependent upon them for support will be given the same consideration in issuing free transportation as is granted other employees in the service." At the time this contract was signed, L & N was engaged in the business of operating passenger trains. Its employees, including the electrical workers, were issued passes for themselves and their dependents. These passes were valid until L & N ceased its passenger operations on May 1, 1971. After that date L & N operated no passenger service, and thus its passes were not valid.

The Rail Passenger Service Act, as originally adopted by Congress made no provision for free transportation on Amtrak trains. When Amtrak entered into a contract with various railroads including L & N on April 16, 1971, the only provision in the contract for free passage stated that:

> Employees of railroads shall be entitled to ride on intercity rail passenger trains, including locomotives, without charge, whenever necessary, in connection with the inspection, maintenance, or operation of such trains.

Amtrak declined to honor any railroad passes. The United States District Court for the Eastern District of Pennsylvania upheld Amtrak's action in refusing to honor railroad passes in the case of *Baker* v. *System Federation No. 1,* 331 F.Supp. 1363 (E.D. Pa. 1971). The union in that case relied upon its contract with the Penn Central Railroad, which contained language identical with the language from the L & N contract quoted above. The *Baker* court concluded that, "The above provision, clearly basing the right of free transportation on the 'established practice of *the company*' does not appear to us to be binding upon Amtrak, who was, of course, not a party to the agreement." *Id.* at 1366 (emphasis in original). Subsequent to this decision Congress amended the Rail Passenger Service Act on June 22, 1972, by adding section 565(f). By this amendment Congress provided that:

> [Amtrak] shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this chapter. . . .

45 U.S.C. §565(f). The amendment further provided that the employer railroad would reimburse Amtrak for such costs as Amtrak may have sustained in providing the transportation free to passholders. See Sen.Rep.No. 92-756, 92nd Cong., 2d Sess., ____, reprinted in [1972] U.S. Code Cong. & Ad. News 2393, 2400-01. [hereinafter cited as Senate Report].

Following the adoption of the 1972 amendment, Amtrak mailed passes to the various railroads' employees, including the plaintiff Randall Brent Thompson. These passes did not entitle the employee to board the train without a ticket. Instead, the employee was required to present his pass to an Amtrak ticket agent, fill out a form, and receive a ticket.

On October 1, 1975, plaintiff Thompson presented his pass to the Amtrak ticket agent in Nashville, Tennessee, requesting the issuance of a round trip ticket from Nashville, Tennessee, to Decatur, Alabama, and return. At this time, he signed a request for the ticket which provided the following upon its face:

> RELEASE FROM LIABILITY: The user of this pass ticket expressly assumes all risk of personal injury or death, loss of or damage to property, and delay in connection with this transportation, and relieves Amtrak or its agents from all liability therefor. I AGREE TO THE FOREGOING CONDITIONS.

Mr. Thompson then boarded the train and was involved in the accident in question. The question presented is whether the waiver of liability is valid. The validity of such agreements is determined by whether or not the pass rider received a free pass or whether it was supported by consideration. The two cases from the Sixth Circuit that control the case at bar are *Martin* v. *Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955), and *Uhlik* v. *Penn Central Railroad,* 459 F.2d 460 (6th Cir. 1972). In the *Martin* case, plaintiff was an employee of the Greyhound Corporation. His union's contract with Greyhound provided that employees were entitled to have passes for Greyhound's bus system issued to them and their families. The Court of Appeals in an opinion by Judge Simons held that the transportation was not in fact free transportation but was furnished in accordance with the passholder's employment contract. The pass constituted a portion of his wages, as did other fringe benefits, such as Social Security, paid vacations, and hospitalization. The court concluded that, because the pass was not gratuitous, the waiver of liability signed by the passholder did not preclude his action for damages.

In *Uhlik,* the plaintiff was an employee of the New York Central Railroad, but at the time of the accident he was riding over the road of Penn Central. The court held that the pass was

gratuitous and that the passholder's agreement to waive liability for ordinary negligence was valid. The plaintiff's case was therefore dismissed, the court stating that: "The validity of a pass issued by an inter-state carrier is determined by federal law. It has long been settled that provisions of free passes exempting the railroad company from liability for ordinary negligence, are valid. [Citing a number of cases from the Supreme Court of the United States.]" 459 F.2d at 461.

In the case at bar, the plaintiff Thompson was an L & N employee riding an Amtrak passenger train. However, as provided by statute, L & N as plaintiff's employer paid or was obligated to pay Amtrak the cost of providing the passenger service to Thompson. *See* 45 U.S.C. §565; Senate Report, *supra.* Clearly Amtrak was not providing a free pass to Thompson. *Uhlik, supra,* recognizes this distinction by the following language: "There was *no proof of consideration* for issuance of the pass, and no evidence was offered to support any claim that the Railroad Company was guilty of willful and wanton misconduct, which was not even pleaded." 459 F.2d at 461 (emphasis added). The source of the consideration is not the point in issue. The pertinent inquiry is whether the pass was a free pass or whether the carrier issuing it received consideration therefor. This court can discern no conflict between the *Martin* and *Uhlik* cases as they apply to the facts of this case. This court determines that plaintiff Thompson was a "paid" as distinguished from a "free" passenger on the Amtrak train, and that the waiver of liability is therefore of no effect.

. . .

Plaintiff Randall Brent Thompson's recovery is determined as follows:

(1) Expenses	$ 20,242.47
(2) Pain, suffering and fright	35,000.00
(3) Permanent injuries	50,000.00
(4) Impairment to earning capacity	90,000.00
(5) Impairment to enjoyment of life	80,000.00
	$275,242.47

The remaining plaintiffs, Gladys Thompson, wife of plaintiff Randall Brent Thompson, and the two minor children, Randy and Donna, were not hospitalized other than for emergency care, and none of them received any injuries of a permanent nature, although all sustained contusions and abrasions. Plaintiff Donna Thompson sustained lacerations on her hand and forehead that did not require sutures, and the scaring is minimal.

The damages recoverable by these plaintiffs for pain, suffering and fright are $3,500.00 for Gladys Thompson, $1,500.00 for Randy Thompson, and $5,000.00 for Donna Thompson.

An appropriate order will be entered.

/s/ L. CLURE MORTON
Chief Judge

Supreme Court, U. S.
FILED
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No. 80-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RANDALL BRENT THOMPSON,

Petitioner,

VS.

NATIONAL RAILROAD PASSENGER CORPORATION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, National Railroad Passenger Corporation (Amtrak) and Louisville and Nashville Railroad Company (L&N), respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case, reported at 621 F. 2d 814.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner seeks review of a Sixth Circuit Court of Appeals decision that is not in conflict with any decision of any other Court of Appeals and is consistent with:

1) every decision that has ever been rendered by this Court on the issue of limitation of liability provisions in free passes issued to railroad employees; and

2) all relevant provisions of the Railway Passenger Service Act (45 U.S.C. §501 *et seq.*) and the legislative history accompanying that Act.

Moreover, the basic factual premise underlying the entire petition—that the L&N Railroad and Amtrak had a contractual obligation to issue petitioner a free pass (Pet., pp. 16, 18, 19, 20, 22, 24, 29)—is directly contrary to the evidence presented in the trial court and before the Court of Appeals. There is no unresolved question of federal law warranting this Court's consideration.

1. Neither The Record Below Nor The Court Of Appeals Decision Raises The Issue Presented In The Petition.

The basic issue that petitioner attempts to raise in this Court was not established or even supported by the evidence presented in this case. In the language of the Court of Appeals (621 F. 2d at 821):

> "Whether a requirement in a collective bargaining agreement that free passes be issued would be sufficient consideration given the rationale of the Supreme Court cases concerning free passes *need not be decided here since there is no such express requirement in the present case.*"
>
> (Emphasis added)

Indeed, the evidence showed that the collective bargaining agreement between the L&N and plaintiff's union did not impose any obligation on the L&N to provide plaintiff or anyone else with a free pass. Rather, it imposed only a uniformity requirement so that to the extent the Railroad chose to issue any free passes to any of its employees, the electrical union employees "will be given the same consideration" (App. II, p. 106)[1] (Ex. 83, p. 24). As stated by the Court of Appeals:

> "This provision only guarantees equal treatment, not that employees shall receive passes" (621 Fed. 2d at 820).

Neither did the agreement between Amtrak and the L&N impose any obligation to issue free passes. On the contrary, §7.5 of the Basic Agreement (omitted from the petition)[2] expressly provided:

> "Transportation privileges, if any, with respect to business and personal travel of railroad personnel *shall be determined by NRPC* (Amtrak)" (App. II, p. 5) (Ex. 1, p. 26) (Emphasis added).

Nor does 45 U.S.C. §565(f) or any other provision of the Railway Passenger Service Act (45 U.S.C. §501 *et seq.*) impose any contractual obligation on Amtrak. Rather, §565(f) (Petition, pp. 2-5) provides that those employees who received free passes from their employer

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[1] All Appendix references are to Appendices filed in the Court of Appeals.

[2] The provision set forth at the bottom of page 18 of the petition applies to "displaced employees" (employees displaced or dismissed due to discontinuance of inner city rail service under 45 U.S.C. §565) and again imposes a uniformity requirement so that such employees are not deprived of any free pass privileges that are available to active service employees during the "protective period" as that term is defined in paragraph 1(d) of the agreement.

railroads prior to April 30, 1971 would in the future receive free passes from Amtrak. The legislative history accompanying the Act stated that "Congress is merely continuing pass policies which the railroads themselves developed" and "restor(ing) to railroad employees, retirees and their dependents pass privileges held on April 30, 1971". 2 *U.S. Congressional and Administrative News* 1972 at 2400, 2396.

The statute expressly authorized Amtrak to issue its passes subject to "a single systemwide schedule of terms" which "reflect terms applicable to the majority of such employees" as of April 30, 1971. 45 U.S.C. §565(f). The most common and significant pre-existing free pass "term" was the repeatedly upheld waiver of liability clause which petitioner acknowledged and executed in obtaining his free ticket in this case (App. II, p. 105). Again, as stated by the Court of Appeals: "Congress was merely restoring rights the employees formerly had, not creating new rights" (621 F. 2d at 820).

2. The Question In This Case Has Not Been "Left Open" By This Court.

Petitioner is in error on the law as well as the facts. The question of the validity of a waiver of liability provision in a free pass issued to a railroad employee in interstate commerce has been answered in the affirmative by this Court in at least five different decisions over a span of forty years. *Boering v. Chesapeake Beach R. Co.*, 193 U.S. 442 (1904); *Northern Pacific R. Co. v. Adams*, 192 U.S. 440 (1904); *Charleston & Western Carolina R. Co. v. Thompson*, 234 U.S. 576 (1914); *Kansas City So. R. Co. v. Van Zant*, 260 U.S. 459 (1923); *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1948). Also, Congress's failure in three-quarters of century to make any

change in the rule announced in these cases, despite numerous opportunities to do so in its enactment and amendment of "free pass" provisions both in the Hepburn Act (Pet. pp. 5-8) and the Railway Passenger Service Act (Pet. pp. 2-5), are "most persuasive indications" of the continuing validity of the limitation of liability provisions, *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450 (1948).

Petitioner is also wrong in his claim that these consistent Supreme Court decisions have led to "divergent results" in the lower courts. On the contrary, the lower courts, both federal and state, have consistently enforced and upheld waiver of liability provisions in interstate railroad passes. *Holeman v. Louisville & Nashville Railroad Co.*, 319 S.W. 2d 47 (Ky. 1958) (upholding waiver provision in an L&N pass), *cert. denied*, 359 U.S. 1012; *Uhlik v. Penn Central R.R.*, 459 F. 2d 460 (6th Cir. 1972); *Gonzales v. Baltimore & Ohio R.R.*, 318 F. 2d 294 (4th Cir. 1963), *cert. denied*, 375 U.S. 911; *Lansford v. Cleveland Union Terminals Co.*, 165 N.E. 2d 3 (Ohio 1960); *Richards v. Atchison, Topeka & Santa Fe R. Co.*, 226 F. Supp. 812, 814 (S.D. Iowa 1964); *Luerson v. Seaboard Air Line R.R.*, 203 F. Supp. 707, 708 (E.D. N.Y. 1962). As noted by the Court of Appeals (621 F. 2d at pp. 822-823), many of these decisions also involved a minor service fee or accommodation charge, and in each case it was held that such a *de minimis* payment does not make a "free pass" any less free, particularly when (as here) the pass holder himself paid nothing. See also *Braughton v. United Air Lines, Inc.*, 189 F. Supp. 137 (W.D. Mo. 1960); *Sims v. Northwest Airlines, Inc.*, 269 F. Supp. 272, 273 (S.D. Fla. 1967).

Petitioner urges an intracircuit conflict with *Martin v. Greyhound Corp.*, 227 F. 2d 501 (6th Cir. 1955), *cert.*

denied, 350 U.S. 1013. But the *Greyhound* case did not involve a railroad pass or any of the judicial and legislative history regarding railroad passes. Further unlike the case at bar, the bus company in *Martin* was contractually obligated to issue plaintiff his pass by a provision in plaintiff's union employment contract (227 F. 2d at 503-504). Also, plaintiff in *Martin* alleged wilful and wanton conduct that was not covered by any liability waiver. In the instant case, petitioner attempted to prove wilful and wanton conduct, but the trial court found against him and the finding was affirmed by the Court of Appeals (621 Fed. 2d at 819).

3. The Decision Below Reflects An Appropriate Application Of Federal Law To Interstate Transportation.

Petitioner claims that continued application of federal law to this issue of interstate transportation is no longer appropriate. But if there has been any change in the federal interest in interstate railroad passenger transportation, it is that the federal interest has increased with the entire nationwide system of passenger trains now being operated, not by the individual railroads, but by Amtrak under federal statutes and substantial federal supervision. See e.g., 45 U.S.C. §§501, 542, 543, 548.

Finally, as noted by the Court of Appeals the result in this case would have been no different even if state law had been applied. 621 F. 2d at 821 n.2.

CONCLUSION

For the reasons stated herein, the Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit should be denied.

Respectfully submitted,

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